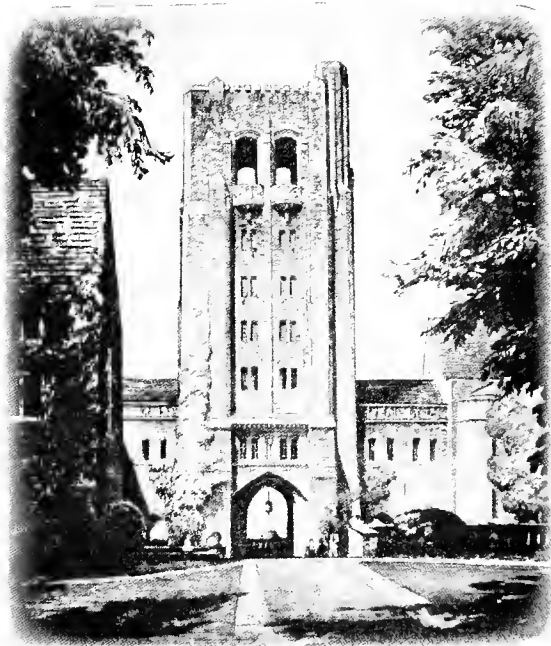


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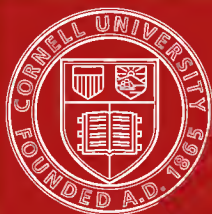
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THE LAW

OF

REFEREES,

UNDER THE

CODE AND STATUTES

OF

NEW YORK,

WITH FORMS.

BY

WALTER S. POOR.

OF THE NEW YORK BAR.

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PREFACE.

PRIOR to the preparation of this work but two treatises on Referees and References had been published in this State, one by the late Charles Edwards, issued in 1860, and one by the late Hon. Murray Hoffman, issued in 1875. Both these books, excellent in their time, have been rendered almost obsolete by subsequent changes in the statutes and rules of court. This work is intended to give, in as few words as possible, the practice as it exists to-day, and to cite the authority for each proposition stated. The name and branch of the court making the decision, and the date thereof are given in each instance, enabling the reader to see at a glance the value of the ruling. The Forms have been prepared with considerable care, and will, it is believed, be found sufficient for all cases that may arise, while the Tables of Contents, Table of Cases, and Sections of the Code Cited, and the Index, will enable the reader to readily find any subject to which he may wish to refer.

WALTER S. POOR.

N. Y., JULY, 1888.

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THE LAW OF REFEREES.

PART I.

CHAPTER I.

INTRODUCTION.

References were unknown to the common law. The nearest approach thereto was the old action of account, in which, if plaintiff had judgment that an accounting should be had, auditors were appointed to take and state the account. This form of action was limited in its scope, was one of the most dilatory and expensive that ever existed, and was rarely resorted to.¹ The germ of our present system may, perhaps, be found in the practice that obtained here as early as 1654 under the Dutch governors. At that early date, if the cause before the court was intricate, or the truth difficult to ascertain, it was almost always referred to arbitrators who were instructed to bring about a reconciliation if possible. Nor was this practice confined to cases of dispute about accounts, or to differences growing out of contracts, but extended to nearly every kind of action that came before the court. The arbitrators were selected by the litigants, or appointed by the court.² This practice continued to a greater or less extent under the English governors until 1683, when the Charter of Liberties provided that all trials should be by the verdict of twelve men.³ Trial by jury of actions involving long and intricate accounts proved unsatisfactory and burdensome, and in 1768 the colonial legislature passed the following

¹ Sup'm. Ct. 1842, *McMurray v. Rawson*, 3 Hill 59.

³ Com. Pl. 1874, *Magown v. Sinclair*, 5 Daly, 63.

² Introduction to 1 E. D. Smith's Com. Pl. Rep. p. XXIX.

act: "Whereas, instead of the ancient action of account suits are of late, for the sake of holding to bail, and to avoid the wager of law, frequently brought in assumpsit, whereby the business of unraveling long and intricate accounts, most proper for the deliberate examination of auditors, is now cast upon jurors, who at the bar, are now disadvantageously circumstanced for such services, and this burden upon jurors is greatly increased since the laws made for permitting discounts in support of a plea of payment, so that by the change of the law and the practice above mentioned, the suits of merchants and others upon long accounts are exposed to erroneous decisions, and jurors perplexed and rendered more liable to attainments; and by the vast time necessarily consumed in such trials, other causes are delayed, and the general course of justice greatly obstructed. Be it therefore enacted so that whenever it shall appear probable in any cause depending in the Supreme Court of Judicature of this colony (other than such as shall be brought by or against executors or administrators) that the trial of the same will require the examination of a long account, either on one side or the other, the said court is hereby authorized, with or without the consent of parties, to refer such cause by rule to be made at discretion to referees," etc.¹ This act expired by its own limitation Jan. 1, 1771, but was re-enacted Feb. 16, 1771,² to continue in force until Feb. 1, 1780.³ By an act passed Feb. 26, 1772, the powers thus conferred on the Supreme Court were extended to the Courts of Common Pleas and to the Mayors' Courts of the cities of New York and Albany.⁴ Such was the state of legislation on this subject at the time of the adoption of the State Constitution in 1777. That instrument provided that "the trial by jury in all cases in which it has been heretofore used, shall remain inviolate for ever."⁵ The constitution of 1822 contains the same provision;⁶ so does

¹ Van Schaick's Laws, N. Y., Vol. 2, p. 517.

² Van Schaick's Laws, N. Y., Vol. 2, p. 60.

³ Van Schaick's Laws, N. Y., Vol. 2, p. 607.

⁴ Van Schaick's Laws, N. Y., Vol. 2, p. 642.

⁵ Constitution of 1777 Art. 7, § 2.

⁶ Constitution of 1822, Act 7, § 2.

that of 1846.¹ The colonial act of 1771 was, by the constitution, made the law of this State,² consequently no citizen thereof or suitor therein at the time of the adoption of the Constitution had the right of trial by jury of a common law action on contract involving a long account.³ The act of 1771 expired by its own limitation Feb. 1, 1780, and from that time until Feb. 27, 1788, no law authorizing references could be found in our statutes. On the last named date the act of 1771 was revived, and the authority to order references extended to all courts of record, and also to causes wherein executors and administrators were parties.⁴ The statute of 1801⁵ re-enacts with less verbiage the act of 1788, and this was followed in turn by the act of 1813.⁶ Subsequent statutes are in substance re-enactments of the law of 1771. In some of these it was expressly declared that the action must be on contract,⁷ in others this provision was omitted,⁸ but the right to refer actions on contract involving a long account is given by all. It will be observed that the form of the statute is always permissive, never mandatory.⁹ A reference, even in actions involving a long account, is not, and never has, since the adoption of the constitution, been a matter of right, but always of discretion;¹⁰ the right of trial by jury only as it existed in 1777 has been preserved. No statute subsequently passed can impair it,¹¹ and a compulsory reference of issues can be ordered now only where it could have been ordered before the code.¹²

¹ Constitution of 1846, Art. 1, § 2.

⁹ Van Schaick's Laws, N. Y., Vol.

² Ct. App. 1870, *Townsend v. Hendricks*, 40 How. 143.

2, p. 517; L. 1845, Ch. 163, § 3; Code Civ. Proc. § 1013.

³ Ct. App. 1870, *Townsend v. Hendricks*, 40 How. 143.

¹⁰ N. Y. Super. 1882, *Day v. Jamison*, 49 Super. 373, 1877, *Martin v. Windsor Co.*, 70 N. Y. 101.

⁴ Greenleaf's Laws of New York, Vol. 2, p. 103, § 2.

¹¹ Ct. App. 1870, *Townsend v. Hendricks*, 40 How. 143.

⁵ Kent & Radcliff's Laws, N. Y., Vol. 1, p. 347, § 2.

¹² Ct App. 1870, *Townsend v. Hendricks*, 40 How. 143; Sup'm

⁶ Revised Laws, N. Y., p. 516, § 2.

⁷ L. 1845, ch. 163, § 3.

Ct. Sp. T. 1859, *Cameron v. Freeman*, 18 How. 310; Sup'm Ct. 1875, *Place v. Cheeseborough*, 4 Hun, 577.

⁸ Code, Civ. Proc. § 1013; Revised Laws, N. Y., Vol. 1, p. 356.

CHAPTER II.

REFERENCE OF ISSUES BY CONSENT.

SECTION 1.—What Action may be Referred by Consent.

SECTION 2.—The Consent to Refer.

SECTION 3.—Who may be Referee.

SECTION 4.—Order in Reference by Consent.

§ 1. **What Actions may be Referred by Consent.**—Any action or any of the issues in an action, except one to annul a marriage, or for a divorce, or a separation, or an action against a corporation to obtain a dissolution thereof and the appointment of a receiver or the distribution of its property, unless it is brought by the attorney-general, or an action wherein a defendant to be affected by the result is an infant, must be referred upon the written consent of the attorneys, duly filed. An action to annul a marriage, or for a divorce or a separation can be referred only by consent.¹ The court may, in its discretion, grant or refuse such reference, and if granted the court must designate the referee.² Actions in equity as well as at law may be referred by consent of the parties,³ so may an issue of law as well as of fact,⁴ but a reference of the issues cannot be had until the cause is ready for trial as to all the defendants,⁵ nor of issues of law and fact while a demurrer is pending.⁶

¹ Code Civ. Proc., §§ 1011, 1012.

² Code Civ. Proc., §§ 1011, 1012; Rule 73.

³ Code Civ. Proc., § 1011; Sup'm Ct. 1879, *Bell v. Vernoy*, 18 Hun, 125; 1875, *Macy v. Nelson*, 62 N. Y., 638; Sup'm Ct. 1868, *Franklin v. Chapin*, 53 Barb., 488; 35 How., 155; N. Y. Surr. 1885, *Benedict v. Cooper*, 3 Dem., 362; 2 How. N. S., 38; Sup'm Ct. 1875, *Thurber v. Chambers*, 4 Hun, 721.

⁴ Code Civ. Proc., §§ 1011, 1019;

1868, *Coffin v. Reynolds*, 37 N. Y., 640; 1873, *Schuyler v. Smith*, 51 N. Y. 309; Rule 30.

⁵ Sup'm Ct. 1860, *Hawkins v. Avery*, 32 Barb. 551; N. Y. Super. 1867, *Wheeler v. Falconer*, 30 Super. 45; Sup'm Ct. 1846, *Dutcher v. Wilgus*, 2 Hun. 180; N. Y. Super. 1856, *Goodyear v. Brooks*, 27 Super. 682.

⁶ Sup'm Ct. 1824, *Jansen v. Tappen*, 3 Cow. 339.

§ 2. **The Consent to Refer.**—The consent to refer should be in writing, should contain the title of the cause, and be signed by the attorneys,¹ but a written one, made but not signed, when acted upon by the court, has been held sufficient,² so has one signed by counsel,³ or oral consent in open court, the entry thereof in the minutes by the clerk being sufficient to satisfy the statute.⁴ The consent once given cannot thereafter be questioned,⁵ nor will it be set aside by the court on the application of a party on the ground that he is unable to pay the necessary fees,⁶ and waives the objection that the cause is not referable.⁷ It should state precisely what is referred,⁸ and the better practice is to make it unconditional. A stipulation to refer the cause to three referees to hear and determine on legal and equitable principles, is an arbitration, not a reference,⁹ so is one to submit to the decision of the referee absolutely without regard to the evidence,¹⁰ and works a discontinuance of the action,¹¹ even though the submission be void;¹² but the parties may, by their acts, give a different construction

¹ Code Civ. Proc. §§ 1009, 1011.

² Sup'm. Ct. Sp. T. 1868, *Waterman v. Waterman*, 37 How. 36; Sup'm. Ct. 1852, *Leacycraft v. Fowler*, 7 How. 259.

³ Sup'm. Ct. 1870, *Tiffany v. Lord*, 40 How. 481.

⁴ Sup'm. Ct. 1879, *Bell v. Vernoy*, 18 Hun, 125; 1875 *Macy v. Nelson*, 62 N. Y. 638; Sup'm. Ct. 1868, *Bucklin v. Chapin*, 53 Barb. 488; Sup'm. Ct. 1852, *Leacycraft v. Fowler*, 7 How. 259; Sup'm. Ct. Sp. T. 1851, *Keator v. Ulster Co.*, 7 How. 41; N. Y. Surr. 1885, *Benedict v. Cooper*, 3 Dem. 362; 2 How. N. S. 38; Sup'm. Ct. 1840, *Lee v. Tillotson*, 24 Wend. 337.

⁵ Sup'm. Ct. 1835, *Greene v. Patchen*, 15 Wend. 293; 1820, *Russell v. Yates*, 17 Johns. 461.

⁶ N. Y. Super. 1887, *Winans v. Winans*, 54 Super. 542.

⁷ Sup'm. Ct. 1830, *Armstrong v.*

Perey, 5 Wend. 535; Sup'm. Ct. 1830, *Harris v. Bradshaw*, 18 Johns. 26; Sup'm. Ct. 1840, *Lee v. Tillotson*, 24 Wend. 337.

⁸ N. Y. Super. 1849, *Renouil v. Harris*, 4 Super. 647.

⁹ N. Y. Super. 1849, *Blunt v. Whitney*, 5 Super. 4.

¹⁰ 1878, *Clafin v. Meyer*, 75 N. Y. 260; 1863, *Merritt v. Thompson*, 27 N. Y. 225.

¹¹ N. Y. Super. 1849, *Blunt v. Whitney*, 5 Super. 4; 1878, *Clafin v. Meyer*, 75 N. Y. 260; 1863 *Merritt v. Thompson*, 27 N. Y. 225; Sup'm. Ct. 1829, *Larkin v. Robbins*, 2 Wend. 505; Sup'm. Ct. 1848, *Jordan v. Hyatt*, 3 Barb. 275; Sup'm. Ct. 1879, *Keep v. Keep*, 17 Hun, 152.

¹² Sup'm. Ct. 1879, *Keep v. Keep*, 17 Hun, 152; Sup'm. Ct. 1848, *Jordan v. Hyatt*, 3 Barb. 275.

to the consent and the order entered thereon.¹ A stipulation referring the cause to three referees named, prescribing the evidence to be received, limiting the time of making the report, providing that if the report shall not be made within the time named the authority of two of said referees who are specified shall cease, and that the third shall proceed and complete the trial, that judgment may be entered on his report, and waiving the right to appeal from the judgment, is not an arbitration but a reference, and the action continues in court.² If the parties desire a referee of their own selection the stipulation should name him, and should further provide that should the reference be refused by the one so named, or should the judgment be reversed on appeal, the parties should name the substitute,³ should this power not be reserved the court must appoint another,⁴ the word *must* is imperative;⁵ any number not exceeding five may be selected.⁶ There is no provision of the code requiring that a sole referee, or any one of two or more appointed by consent shall be members of the bar, but the court rules provide that no one shall be appointed who is the clerk or partner of the attorney or counsel of the party in whose behalf application for such appointment is made, or who is in any way connected in business with such attorney or counsel, or who occupies the same office with such attorney or counsel.⁷ The stipulation should state precisely what is to be referred. A reference of all the issues embraces all subordinate matters in the order, and is conclusive on appeal therefrom.⁸

§ 3. **Who may be Referee.**—No judge of the court of appeals, justice of the supreme court, or judge of a court of record in the cities of New York, Brooklyn or Buffalo, can act as referee;⁹ the prohibition cannot be waived by the

¹ 1878, *Clafin v. Meyer*, 75 N. Y. 260.

² N. Y. Super. 1866, *Healy v. Gilman*, 29 Super. 479.

³ Code Civ. Proc. § 1011.

⁴ Code Civ. Proc. § 1011.

⁵ Sup'm. Ct. 1881, *May v. Moore*,

24 Hun, 351; Sup'm. Ct. 1886, *Carter v. Wallace*, 3 How. N. S. 350.

⁶ Code Civ. Proc. § 1025.

⁷ Rule 80.

⁸ Sup'm. Ct. 1886, *Jones v. Jones*, 1 N. Y. St. Rep. 759.

⁹ Constitution of N. Y., Art. VI, § 21.

parties, but it does not apply to a commissioner of appeals.¹ Where a referee after beginning the trial was appointed justice of the supreme court, and while in the performance of his duties as such justice made his report as referee, the report, and all proceedings thereon, were set aside, but the term of the justice having expired, leave was given to either party to proceed with the reference as it stood prior to the day when the referee took the oath as justice of the supreme court.² No one holding the office of clerk, deputy clerk, special deputy clerk, or assistant in the clerk's office of a court of record, or of the surrogate's court within either of the counties of New York or Kings can be appointed except by the written consent of all the parties to the action or special proceeding, other than parties in default for failure to appear, or to plead;³ the stenographer of the New York surrogate's court is not within this prohibition.⁴ No judge can be appointed a referee in an action brought in the court of which he is a judge, except by written consent of the parties, and in such case he can receive no compensation as referee,⁵ nor can any one be appointed who is the partner or clerk of the attorney, or counsel of the party in whose behalf application for such appointment is made, or who is in any way connected in business with such attorney or counsel, or who occupies the same office with such attorney or counsel.⁶ Except in an action to annul a marriage or for a divorce or a separation; or an action against a corporation to obtain a dissolution thereof, the appointment of a receiver of its property, or the distribution of its property, unless it is brought by the attorney-general; or an action wherein a defendant to be affected by the result of the trial is an infant, no person save an attorney of the court in good standing can be appointed a referee for any purpose in any action or proceeding.⁷ The referee must be free from all just objection, and except in an action to annul a marriage, or for a divorce or a separation one to

¹ 1872, *Settle v. Van Evrea*, 49 N. Y. 280.

² Sup'm. Ct. 1880, *Countryman v. Norton*, 21 Hun, 17.

³ Code Civ. Proc. § 90.

⁴ N. Y. Surr. 1885, *Benedict v. Cooper*, 3 Dem. 362; 2 How. N. S. 38.

⁵ Code Civ. Proc. § 1024.

⁶ Rule 80.

⁷ Rule 80, Code Civ. Proc. § 1011.

whom all the parties object cannot be appointed.¹ That the one selected is the friend and confidential adviser of a nephew of one of the parties does not disqualify him, especially when the fact is known to both parties when the appointment is made;² nor does the fact that the firm of which the referee is a member is counsel for a corporation in which plaintiff is interested;³ nor the fact that in a former action for divorce between the parties, the one appointed found in favor of defendant;⁴ but one who has found one of the parties guilty in an action for divorce should not be appointed in proceedings as to the custody of the children,⁵ nor one who on a former trial found against one of the parties on a question of fact.⁶ This rule has been held inapplicable where a new trial was ordered on a question of law.⁷ While there is no express provision to that effect, it is to be presumed that a person who would be disqualified to act as a judge could not act as referee, that is, in a cause in which he is a party, or has been counsel, or is interested, or is related by consanguinity or affinity to any party in the controversy within the sixth degree.⁸ That the person named has causes pending in which the attorney for one of the parties is a referee is a valid objection.⁹ Where more than one is appointed in a case involving mechanical science rather than matters of law a mechanic may be selected,¹⁰ so in settling a merchant's estate a merchant may be appointed with others¹¹ in an action by an attorney for services, one lawyer and two laymen were appointed,¹² so two grocers and one lawyer have

¹ Code Civ. Proc. § 1024.

² Sup'm. Ct. Sp. T. 1885, *Durant v. O'Brien*, 2 How. N. S. 313.

³ 1878 *Baird v. Mayor*, 74 N. Y. 382.

⁴ N. Y. Super. Sp. T. 1868, *Clark v. Clark*, 30 Super. 62.

⁵ Sup'm. Ct. 1886, *Matter of Bliss*, 39 Hun, 594.

⁶ Sup'm. Ct. Sp. T. 1857, *Billings v. Vanderbeck*, 15 How. 295; Sup'm Ct. 1860, *Sharp v. Mayor*, 31 Barb. 578; Sup'm. Ct. Sp. T. 1856,

Schemerhorn v. Van Alen, 13 How. 82.

⁷ Sup'm. Ct. Sp. T. 1857, *Billings v. Vanderbeck*, 15 How. 295.

⁸ Code Civ. Proc. § 46.

⁹ Sup'm Ct. 1883, *Carroll v. Lufkins*, 29 Hun, 17.

¹⁰ 1854 *Olmsted v. Loomis*, 9 N. Y. 423.

¹¹ *Chancery*, 1814, *Roosevelt v. Thurman*, 2 Johns. Ch. 220.

¹² Sup'm. Ct. 1885, *Hale v. Swinburne*, 17 Abb. N. C. 381.

been appointed.¹ It is not necessary that the referee should reside within the jurisdiction of the court appointing him.² The objection to the person named must be taken promptly, proceeding after knowledge without objection is a waiver, if the objection can be waived.³ It is not necessary that the referee should reside, or the trial be had within the jurisdiction of the court.⁴ When two causes involving the same question are referred to the same referee, and he has decided one in favor of plaintiff, the court may refer the second case to another.⁵ Where an action has been successively tried before two referees who have arrived at opposite conclusions, on the second reversal the order of reference will be vacated, and the cause sent to a jury;⁶ after reversal of a judgment entered on a report, either party may move for a new referee;⁷ unless expressly so directed in the order reversing the judgment and ordering a new trial, the order of reference is not vacated by the reversal;⁸ the contrary has been held in the common pleas.⁹ It is discretionary with the court whether, on the request of the referee, it will vacate his appointment because he is unable to hear the cause within the time requested by the parties.¹⁰

§ 4. **Order in References by Consent.**—The order must be made by the court, not by a judge,¹¹ and should be made or

¹ N. Y. Super. 1870, *Townsend v. Glens Falls Co.*, 10 Abb. N. S. 277.

² Sup'm. Ct. 1884, *O'Brien v. Catskill Co.*, 32 Hun, 636.

³ Sup'm. Ct. 1883, *Carroll v. Lufkins*, 29 Hun, 17; Sup'm. Ct. 1879, *Catlin v. Adirondack Co.*, 19 Hun, 389.

⁴ 1879, *Blake v. Lyon Co.*, 77 N. Y. 626.

⁵ City Court, Brooklyn, Sp. T. 1880, *Conley v. Petrie*, 60 How. 299.

⁶ Com. Pl. 1868, *Stouvenel v. Stevens*, 2 Daly, 319.

⁷ Sup'm. Ct. 1879, *Catlin v. Adirondack Co.*, 19 Hun, 389.

⁸ 1880, *Catlin v. Adirondack Co.*, 81 N. Y. 379, Sup'm. Ct. 1857, *Bill-*

ings v. Vanderbeck, 15 How. 295; Sup'm. Ct. 1869, *White v. Smith*, 1 Lans. 469; Sup'm. Ct. 1854, *Schemerhorn v. Van Alen*, 13 How. 82; Sup'm. Ct. 1862, *Murphy v. Winchester*, 35 Barb. 616; Sup'm. Ct. 1860, *Sharp v. Mayor*, 31 Barb. 578; Sup'm. Ct. 1876, *Kursted v. O. & A. R. R. Co.*, 54 How. 29.

⁹ Com. Pl. 1876, *Devlin v. Mayor*, 6 Daly, 486; 54 How. 11.

¹⁰ 1881, *Parkhurst v. Berdell*, 87 N. Y. 145.

¹¹ Code Civ. Proc. § 1011; Buff. Super. Sp. T. 1879, *Stafford v. Ames*, 8 Abb. N. C. 237; Sup'm. Ct. 1860, *Bonner v. McPhail*, 31 Barb. 106; Sup'm. Ct. Sp. T. 1851, *Keator v. Ulster Co.*, 7 How. 41.

entered at special term.¹ The report of a referee appointed by a chamber order will not sustain a judgment entered on the report of a referee so appointed, when the party against whom it was so entered did not appear.² A memorandum on the calendar of a judge at circuit "referred to L. K. M." gives to the person intended no authority to act as referee. He has no power to administer an oath, nor can a witness be punished for perjury committed before him.³ It is sufficient that the court made the order; proof of entry is not essential;⁴ until it is duly made no default can be taken, although notice of trial is served;⁵ it must follow the consent. The right to object that the cause is not referable is not waived by consent upon conditions not complied with in entering the order;⁶ if the referee appointed is not the one agreed upon the order is void, and the opposing party may proceed at the circuit as if none had been made,⁷ but the irregularity is waived by proceeding without objection before the one appointed. The order may be made now for then,⁸ by a judge who is disqualified by interest from trying the cause.⁹ If the designation of the referee be left to the court one or three may be appointed, unless the consent provides for five.¹⁰ When more than one is appointed one or more may be laymen.¹¹ Except in

¹ Code Civ. Proc. § 1011; Sup'm. Ct. Sp. T. 1864, *Scudder v. Snow*, 29 How. 95; Sup'm. Ct. Sp. T. 1850, *Litchfield v. Burwell*, 5 How. 341; Sup'm. Ct. 1850, *Bonner v. McPhail*, 31 Barb. 106.

² Sup'm. Ct. Sp. T. 1864, *Scudder v. Snow*, 29 How. 95.

³ Sup'm. Ct. 1860, *Bonner v. McPhail*, 31 Barb. 106.

⁴ 1880, *Eighmy v. People*, 79 N. Y. 546; N. Y. Super. 1867, *Wheeler v. Falconer*, 30 Super. 45.

⁵ Sup'm. Ct. Sp. T. 1864, *Scudder v. Snow*, 29 How. 93.

⁶ 1876, *Preston v. Morrow*, 66 N. Y. 452.

⁷ Sup'm. Ct. Sp. T. 1852, *Haner v. Bliss*, 7 How. 246, See *Preston v.*

Morrow, 69 N. Y. 452; Sup'm. Ct. 1860, *Sharp v. Mayor*, 31 Barb. 578.

⁸ N. Y. Super. Sp. T. 1867, *Quin v. Lloyd*, 30 Super. 157; Sup'm. Ct. Sp. T. 1851, *Whalen v. Supervisors*, 6 How. 278; Sup'm. Ct. 1868, *Bucklin v. Chapin*, 53 Barb. 488; Sup'm. Ct. 1851, *Luddington v. Taft*, 10 Barb. 447; Sup'm. Ct. Sp. T. 1864, *Scudder v. Snow*, 29 How. 95.

⁹ Sup'm. Ct. 1879, *Bell v. Vernoy*, 18 Hun, 125.

¹⁰ Code Civ. Proc. § 1025.

¹¹ Sup'm. Ct. 1885, *Hale v. Swinburne*, 17 Abb. N. C. 381; N. Y. Super. 1870, *Townsend v. Glens Falls Co.*, 10 Abb. N. S. 277.

an action to annul a marriage or for a divorce, one to whom all the parties object cannot be appointed.¹ The order should state precisely what is referred. The referee possesses no authority beyond that expressly given or necessarily implied;² if it is intended that the referee shall try the cause the order should be to hear and determine;³ an order to take proof and report with his opinion gives no authority to determine the issues.⁴ When "this cause" is referred all the issues are referred,⁵ including the right to take an account without entering an interlocutory judgment therefor.⁶ If the parties reside at different places provision may be made for sittings at each place,⁷ but the court has no authority to insert in the order a direction that the hearing proceed on less than the statutory notice.⁸ The death of a party and the substitution of his personal representative does not affect the order.⁹ If three are appointed the order should provide that should a trial before three prove impracticable a motion for the discharge of two may be made.¹⁰ If the one appointed refuses to serve, the court must, unless the stipulation provides otherwise, appoint another;¹¹ if he refuses to serve for the statutory fee, but is willing to go on and look to the prevailing party for his fee, either party may make a motion to remove him.¹²

¹ Code Civ. Proc. § 1024.

² Sup'm. Ct. 1860, *Bonner v. McPhail*, 31 Barb. 166; Sup'm. Ct. Sp. T. 1858, *Billings v. Baker*, 6 Abb. 213.

³ N. Y. Super. Sp. T. 1871, *Merrill v. Merrill*, 11 Abb. N. S. 74.

⁴ N. Y. Super. Sp. T. 1877, *Sullivan v. Sullivan*, 52 How. 453.

⁵ N. Y. Super. 1849, *Renouil v. Harris*, 4 Super. 641; Sup'm. Ct. Sp. T. 1850, *Graves v. Blanchard*, 4 How. 300; Sup'm. Ct. 1840, *Lee v. Tillotson*, 24 Wend. 337.

⁶ N. Y. Super. 1862, *McCartan v. Van Syckel*, 23 Super. 674; N. Y. Super. 1860, *Crosbie v. Leary*, 19 Super. 312; Sup'm. Ct. 1856, *Palmer v. Palmer*, 13 How. 363; Sup'm. Ct. 1874, *Mundorf v. Mundorf*, 1

Hun, 41; Sup'm. Ct. 1859, *Pratt v. Stiles*, 9 Abb. 150; 17 How. 211; Sup'm. Ct. 1886, *Central T. Co. v. N. Y. & N. Co.* 42 Hun, 602.

⁷ Sup'm. Ct. 1807, *Newland v. West*, 2 Johns, 188; Sup'm. Ct. Sp. T. 1847, *Pierce v. Voorhess*, 3 How. 111; Sup'm. Ct. 1884, *O'Brien v. Catskill Co.*, 32 Hun, 636.

⁸ Sup'm. Ct. 1874, *Mohrman v. Bush*, 2 Hun, 674.

⁹ Sup'm. Ct. Sp. T. 1873, *Chittengo Co. v. Stewart*, 67 Barb. 423.

¹⁰ Com. Pl. Sp. T. 1880, *Devlin v. Mayor*, 62 How. 260.

¹¹ Sup'm. Ct. 1881, *May v. Moore*, 24 Hun, 351.

¹² Com. Pl. 1878, *Devlin v. Mayor*, 54 Hun. 64.

CHAPTER III.

COMPULSORY REFERENCE OF ISSUES.

SECTION 1.—In what cases ordered.

SECTION 2.—Action must be on contract.

SECTION 3.—Reference cannot be compelled in actions for wrongs.

SECTION 4.—Complaint determines character of action.

SECTION 5.—Action must involve an account.

SECTION 6.—It must be a long account.

SECTION 7.—The account must be directly involved.

SECTION 8.—The trial must not require the decision of difficult questions of law.

§ 1. In what Cases ordered.—The court may, of its own motion, or on the application of either party, without the consent of the other, direct a trial of the issues of fact by a referee, where a long account is involved on either side and the trial will not require the decision of difficult questions of law.¹ Actions in equity as well as at law may be so referred.² The statute is not mandatory, but permissive,³ in no case is a reference under this section a matter of right.⁴ The only purpose of the statute is to relieve the court,⁵ the facts authorizing a reference under the code are the same as they were prior to its adoption,⁶ and should be rigorously confined to actions founded on contract involving a long account.⁷ The court possesses no power to compel a

¹ Code Civ. Proc. § 1013.

² Code Civ. Proc. § 1013 ; 1881 Camp v. Ingersoll, 86 N. Y. 433.

³ N. Y. Super. 1866, Goodyear v. Brooks, 27 Super. 682 ; N. Y. Super. 1867, Wheeler v. Falconer, 30 Super. 45 ; 1877 Martin v. Windsor Co. 70 N. Y. 101.

⁴ N. Y. Super. 1866, Goodyear v. Brooks, 27 Super. 682 ; 1881 Camp v. Ingersoll, 86 N. Y. 433.

⁵ N. Y. Super. 1866, Goodyear v.

Brooks, 27 Super. 682 ; Sup'm. Ct. 1875, Mayor v. Genet, 67 Barb. 275 ; N. Y. Super. Sp. T. 1872, Goodyear v. Williamsburg Co. 12 Abb. N. S. 250 ; 1877, Martin v. Windsor Co. 70 N. Y. 101.

⁶ N. Y. Super. Sp. T. 1856, McCullough v. Brodie, 13 Super. 659 ; Ct. App. 1870, Townsend v. Hendricks, 40 How. 143 ; Ct. App. 1870, Kain v. Delano, 11 Abb. N. S. 29.

⁷ Sup'm. Ct. Sp. T. 1859, Sharp v.

reference in any case where a trial by jury could be demanded under the constitution of 1777.¹

§ 2. **Action must be on Contract.**—The facts authorizing a compulsory reference are the same now as they were prior to the adoption of the code;² although the statute is, in terms, broad enough to include all actions involving a long account that do not require the decision of difficult questions of law, the courts have uniformly held that the right to compel a reference was limited to actions founded on contract,³ and contract includes covenant.⁴ In *Bloore v. Potter*, 9 Wend. 480, a doubt was expressed whether the cause in covenant could have been referred in the face of opposition, and an order of reference in an action on covenant in *Thomas v. Reab*, 6 Wend. 503 was reversed, but it was upon the ground that no account strictly as such was involved. The right to refer an action of covenant was conceded in both.

§ 3. **Reference cannot be Compelled in Actions for Wrongs.**—The court has no authority to order a reference in an action in tort, or sounding in tort;⁵ the contrary has been held in

Mayor, 18 How. 213 ; Ct. App. 1838, *Dedericks Adm'rs. v. Richley*, 1870, *Kain v. Delano*, 11 Abb. N. S. 19 Wend. 108 ; Sup'm. Ct. 1833, 29 ; Sup'm. Ct. 1878, *Barnes v. Bloore v. Potter*, 9 Wend. 480 ; West, 16 Hun, 68. Sup'm. Ct. 1838, *Silmser v. Redfield*, 19 Wend. 21 ; Sup'm. Ct.

¹Ct. App. 1870, *Townsend v. Hendricks*, 40 How. 143 ; Sup'm. Ct. 1874, *Brink v. Republic Co.* 2 T. & C. 550 ; N. Y. Super. Sp. T. 1856, *McCullough v. Brodie*, 13 Super. 659, 13 How. 346. 1844, *Van Rensselaer v. Jewett*, 6 Hill, 373 ; Com. Pl. 1865, *Hatch v. Wolfe*, 1 Abb. N. S. 771 ; Sup'm. Ct. 1880, *Brooklyn Co. v. Reid*, 21 Hun, 273.

²N. Y. Super. Sp. T. 1856, *McCullough v. Brodie*, 13 Super. 659 ; more fully 13 How. 346 ; Ct. App. 1870, *Townsend v. Hendricks*, 40 How. 143. ⁵Ct. App. 1870, *Townsend v. Hendricks*, 40 How. Pr. 143 ; Sup'm. Ct. 1838, *Dedericks Adm'rs. v. Richley*, 19 Wend. 108 ; Sup'm. Ct. 1837, *Silmser v. Redfield*, 19 Wend.

³Ct. App. 1870, *Townsend v. Hendricks*, 40 How. Pr. 143 ; Sup'm. Ct. 1887, *Silmser v. Redfield*, 19 Wend. 21 ; Sup'm. Ct. 1838, *Dedericks Adm'rs v. Richley*, 19 Wend. 108. 21 ; Sup'm. Ct. 1846, *Beardsley v. Dygert*, 3 Den. 380 ; N. Y. Super. 1879, *Verplanck v. Kendall*, 45 Super. 525 ; Sup'm. Ct. 1819, *Johnson v. Parmly*, 17 Johns. 129 ; Com. Pl.

⁴Sup'm. Ct. 1830, *Thomas v. Reab*, 6 Wend. 503 ; Sup'm. Ct. 1867, *Turner v. Taylor*, 2 Daly. 279.

some cases,¹ but they are against the current of authority, and since the decision of the court of last resort in *Townsend v. Hendricks*, the question is no longer open for discussion. A compulsory reference cannot be ordered in actions for damages for negligence;² nor to assess damages on default in such cases,³ nor in an action against a sheriff for a false return,⁴ nor in one against the trustees of a manufacturing corporation for failure to make a report,⁵ nor in one to set aside an assignment for fraud,⁶ nor one for unliquidated damages for breach of contract,⁷ nor in one to assess damages in an action for specific performance of an agreement to convey real property, where defendant admits he never had title,⁸ nor in a controversy founded in tort between the receiver of an insolvent corporation and a creditor thereof,⁹ nor in one against an attorney for malpractice,¹⁰ nor in one to rescind a sale for fraud.¹¹ The rule is the same in equity as at law.¹² The right of trial by jury in common law actions for tort is absolute.¹³

§ 4. **Complaint determines Character of Action.**—The nature of the action is determined by the complaint.¹⁴ The answer

¹ Sup'm. Ct. 1840, *Lee v. Tillotson*, 24 Wend. 338; N. Y. Super. 1851, *Sheldon v. Wood*, 15 Super. 267. Buxton, 15 Abb. 352; 37 Barb. 13; Sup'm. Ct. 1862, *Lansing v. Stone*, 37 Barb. 15.

² Sup'm. Ct. 1850, *McMaster v. Booth*, 4 How. 427; Sup'm. Ct. 1880, *Dunkin v. Sharp*, 22 Hun, 132. ⁹ Sup'm. Ct. 1878, *Wickham v. Frazee*, 13 Hun, 431.

³ Com. Pl. 1880, *Thompson v. Finn*, 9 Daly, 379. ¹⁰ Sup'm. Ct. 1877, *Hoffman v. Sparling*, 12 Hun, 83.

⁴ Sup'm. Ct. Sp. T. 1856, *Dewey v. Field*, 13 How. 437. ¹¹ Sup'm. Ct. 1886, *Morrison v. Horrocks*, 40 Hun, 428.

⁵ Sup'm. Ct. Sp. T. 1876, *Hyatt v. Roach*, 1 Abb. N. C. 125; 52 How. 115. ¹² Sup'm. Ct. 1886, *Rochester v. Mayor*, 3 How. N. S. 527; 9 Civ. Proc. Rep. 326, Sup'm. Ct. 1886, *Morrison v. Horrocks* 40 Hun. 428.

⁶ Sup'm. Ct. Sp. T. 1855, *Draper v. Day*, 11 How. 439. ¹³ N. Y. Super. Sp. T. 1872, *Godfrey v. Williamsburg Co.* 12 Abb. N. S. 250.

⁷ N. Y. Super. 1874, *Ross v. Combs*, 37 Super. 289; Sup'm. Ct. 1863, *Stevenson v. Buxton*, 15 Abb. 352; 37 Barb. 13; 1887, *Untermeyer v. Bernhauer*, 105 N. Y. 521. ¹⁴ 1872, *DeGrauw v. Elmore*, 50 N. Y. 1; 1873, *Welsh v. Darragh*, 52 N. Y. 590; Ct. App. 1870, *Untermeyer v. Bernhauer*, 7 Cent. Rep. 709; 105 N. Y. 521.

⁸ Sup'm. Ct. 1863, *Stevenson v.*

cannot change it;¹ although the court may in its discretion refuse a reference and order a trial before a jury when charges of fraud or wrong doing are set forth in the answer.² Nor does the fact that a wrong is unnecessarily or incidentally alleged in the complaint change the character of the action. If the action is on contract and involves a long account the action may be referred notwithstanding such charges.³ Nor is it necessary that all the issues should be referable; it is enough that the principal cause of action should be,⁴ although as to some of the issues a jury trial is a matter of right.⁵ The contrary has been held in some cases,⁶ but these were prior in date to *Place v. Cheeseborough*, and the rule as stated may be regarded as settled.

§ 5. **Action must involve an Account.**—The action must involve an account, but any attempt to reconcile the conflicting decisions as to what constitutes an account is almost hopeless.⁷ It is substantially agreed that numerous items of damage do not;⁸ that a number of items and distinct

¹ Sup'm. Ct. 1874, *Williams v. Allen*, 2 Hun, 377; City Court, Brooklyn, 1876, *Wood v. Hope*, 2 Abb. N. C. 186; 1873, *Welsh v. Darragh*, 52 N. Y. 590; N. Y. Super. 1884, *Gregory v. Seaman*, 51 Super. 517.

² Sup'm. Ct. 1841, *Levy v. Brooklyn Co.* 25 Wend. 687; N. Y. Super. 1861, *McLean v. East River Co.* 21 Super. 700; Sup'm. Ct. 1861, *Freeman v. Atlantic Co.* 13 Abb. 124; Sup'm. Ct. 1877, *Martin v. Windsor Co.* 10 Hun, 304; App. dismissed, 70 N. Y. 101.

³ N. Y. Super. 1862, *Atocha v. Garcia*, 15 Abb. 303; Sup'm. Ct. 1875, *Mayor v. Genet*, 4 Hun, 658; Sup'm. Ct. 1876, *Harden v. Corbett*, 6 Hun, 523; 1874, *Vilmar v. Schall*, 61 N. Y. 564; Sup'm. Ct. Cir. 1879, *People v. Peck*, 57 How. 315; 1881, *Harrington v. Bruce*, 84 N. Y. 103; Ct. App. 1870, *Townsend v. Hendricks*, 40 How. 143.

⁴ 1875, *Place v. Cheeseborough*, 63 N. Y. 315; N. Y. Super. 1859, *Batchelor v. Albany Co.* 31 Super. 346, N. Y. Super. 1861, *Whittaker v. Desfosse*, 20 Super. 678; Sup'm. Ct. Sp. T. 1850, *Mills v. Thursby*, 11 How. 113.

⁵ N. Y. Super. 1875, *Maryott v. Thayer*, 39 Super. 417.

⁶ N. Y. Super. 1873, *Evans v. Kalbfleisch*, 36 Super. 450; N. Y. Super. 1874, *Ross v. Coombs*, 37 Super. 289.

⁷ *Batchelor v. Albany City Co.* 31 Super. 346.

⁸ N. Y. Super. Sp. T. 1866, *Ross v. Mayor*, 2 Abb. N. S. 266; Sup'm. Ct. 1831, *Thomas v. Reab*, 6 Wend. 503; Sup'm. Ct. 1837, *Silmser v. Redfield*, 19 Wend. 21; Sup'm. Ct. 1844, *Van Renselaer v. Jewett*, 6 Hill, 373; Sup'm. Ct. Sp. T. 1856, *Dewey v. Field*, 13 How. 437; N. Y. Super. 1856, *McCullough v. Bro-*

facts do not.¹ A bill of lading is not an account;² nor is a bill of particulars;³ nor is an attorney's bill for fees and services in a single matter;⁴ nor one bill of fifty items delivered at one time;⁵ nor one of seven items delivered at two different times.⁶ It has repeatedly been held that an account consisting of items on one side only should be referred; that the dealings need not be of a mutual or reciprocal character.⁷ Upon this ground actions on a policy of insurance for injuries to various articles covered thereby have been referred.⁸ The right to order a reference in such cases has been expressly denied.⁹ In each of the cases cited fraud was alleged in the answer, but this did not change the character of the action;¹⁰ and in *Brink v. Republic Co.* the question did not turn on the question of discretion, but was put squarely on the ground of strict right. *Samble v. Mechanics' Co.* 1 Super. 560, is cited as

die, 13 How. 346; Com. Pl. Chamb. 1877; *Randall v. Kingsland*, 53 How. 513; Com. Pl. Chamb. 1883, *Hull v. Allen*, 66 How. 124; Sup'm. Ct. 1838, *Dedericks Adm'rs. v. Richley*, 19 Wend. 108; 1881, *Camp v. Ingersoll* 86 N. Y. 343; 1886, *Morrison v. Horrocks*, 103 N. Y. 675; 1887, *Untermeyer v. Beinhauer*, 105 N. Y. 521.

¹ Com. Pl. 1874, *Dittenhoefer v. Lewis*, 5 Daly, 72; Sup'm. Ct. 1877, *Bell v. Mayor*, 11 Hun, 511; Sup'm. Ct. Sp. T. 1859, *Sharp v. Mayor*, 18 How. 213; Sup'm. Ct. 1865, *Dickinson v. Mitchell*, 19 Abb. 286.

² Sup'm. Ct. Sp. T. 1846, *Miller v. Hooker*, 2 How. 171.

³ 1887, *Untermeyer v. Beinhauer*, 105 N. Y. 521; Sup'm. Ct. 1865, *Dickinson & Mitchell*, 19 Abb. 286.

⁴ Sup'm. Ct. 1877, *Felt v. Tiffany*, 11 Hun, 62; Sup'm. Ct. 1881, *Tracy v. Stevens*, 61 How. 265; Com. Pl. 1874, *Dittenhoefer v. Lewis*, 5 Daly, 72; N. Y. Super. 1873, *Evans v. Kalbfleisch*, 16 Abb. N. S. 13; Sup'm. Ct. 1874, *Flanders v. Odell*, 2 Hun, 664; 16 Abb. N. S. 247.

⁵ Sup'm. Ct. Sp. T. 1846, *Swift v. Wells*, 2 How. 79.

⁶ Sup'm. Ct. 1846, *Smith v. Brown*, 3 How. 9.

⁷ N. Y. Super. 1874, *Hosack v. Hyerdahl*, 38 Super. 391; 60 N. Y. 634; Sup'm. Ct. 1838, *Dedericks Adm'rs. v. Richley*, 19 Wend. 108; 1881, *Camp v. Ingersoll*, 86 N. Y. 433; Sup'm. Ct. 1844, *Van Rensselaer v. Jewett*, 6 Hill. 373; Sup'm. Ct. 1840, *Lee v. Tillotson*, 24 Wend. 337; Sup'm. Ct. Sp. T. 1856, *Dewey v. Field*, 13 How. 437.

⁸ N. Y. Super. 1869, *Batchelor v. Albany City Co.* 31 Super. 346; N. Y. Super. 1829, *Samble v. Mechanics' Ins. Co.* 1 Super. 560; N. Y. Super. Sp. T. 1875, *Ryan v. Atlantic Co.* 50 How. 321.

⁹ Sup'm. Ct. 1874, *Brink v. Republic Co.* 2 T. & C. 550; Sup'm. Ct. 1861, *Freeman v. Atlantic Co.* 10 Abb. 124; Sup'm. Ct. 1841, *Levy v. Brooklyn Co.* 25 Wend. 687.

¹⁰ 1873, *Welsh v. Darragh*, 52 N. Y. 590.

authority in some well considered cases,¹ in others it is distinctly repudiated.² In some the order has been sustained where the number and quantity of the articles has been admitted, but not the identical ones charged;³ in others, presenting many points of similarity, it has been refused.⁴ Goods sold and delivered, and work, labor and services are matters of account;⁵ so are attorney's fees, services and disbursements.⁶ An action for damages liquidated, or capable of being liquidated by computation, is referable;⁷ so is one for an accounting by a tenant in common, though fraud and conspiracy are alleged;⁸ so is one to compel the delivery of securities loaned, though wrongful detainer is alleged;⁹ or one to foreclose a mechanic's lien where the owner alleges he has paid all that is due, that he has a right to certain deductions determinable only by an examination into the details of the work, over three hundred in number;¹⁰ so if the account consists of items on one side only,¹¹ as an action for endorsing a large number of accommodation notes;¹² so when the action was on a promissory note, and the answer alleged that it was held as collateral security for debts for which plaintiff also holds

¹ N. Y. Super. 1869, *Batchelor v. Albany City Co.* 31 Super. 346; Com. Pl. 1885, *Van Orden v. Tilden*, 13 Daly, 396.

² Sup'm. Ct. 1874, *Brink v. Republic Co.* 2 T. & C. 550; 1881, *Camp v. Ingersoll*, 86 N. Y. 433.

³ 1873, *Welsh v. Darragh*, 52 N. Y. 590; Com. Pl. 1885, *Van Orden v. Tilden*, 13 Daly, 396.

⁴ Sup'm. Ct. 1879, *Keep v. Keep*, 58 How. 139; N. Y. Super. Sp. T. 1881, *Hertwell v. Albert*, 3 Law. Bul. 77.

⁵ Sup'm. Ct. Cir. 1879, *People v. Peck*, 57 How. 315; Sup'm. Ct. 1875, *Mayor v. Genet*, 4 Hun, 658; 67 Barb. 275.

⁶ Sup'm. Ct. 1885, *Hale v. Swinburne*, 17 Abb. N. C. 381; Com. Pl. 1884, *Schemerhorn v. Wood*, 4 Daly, 158; Sup'm. Ct. 1880, *Carr v. Ber-*

dell, 23 Hun, 130; Sup'm. Ct. 1883, *Stebbins v. Cowles*, 30 Hun, 523; Com. Pl. Sp. T. 1879, *Byron v. Delamater*, 1 Law. Bul. 62; Sup'm. Ct. 1882, *Merritt v. Vegellius*, 28 Hun, 420; N. Y. Super. 1884; N. Y. Super. 1884, *Gregory v. Siaman*, 51 Super. 517.

⁷ 1881, *Chambers v. Appleton*, 84 N. Y. 649.

⁸ 1881, *Harrington v. Bruer*, 84 N. Y. 103.

⁹ 1875, *Vilman v. Schall*, 61 N. Y. 564.

¹⁰ Sup'm. Ct. 1877, *Tooker v. Rinaldo*, 11 Hun, 154.

¹¹ N. Y. Super. 1874, *Hossack v. Heyerdahl*, 38 Super. 391; 60 N. Y. 634; Sup'm. Ct. 1874, *Bensel v. Galt*, 2 Hun, 679; 1881, *Camp v. Ingersoll*, 86 N. Y. 433.

¹² Com. Pl. Sp. T. 1859, *Masterton v. Howell*, 10 Abb. 118.

other securities, and prayed for an accounting.¹ In an action to dissolve a co-partnership which is denied, and the question has to be decided by an examination of the books, a reference may be ordered;² so where plaintiff asks for a dissolution of a co-partnership which is admitted, for an accounting and a receiver;³ so when, in an action to redeem a certificate of stock given to secure debts and future advances, it is necessary to take an account of such debts and advances.⁴ The characteristic of a referable account, says one of the cases, is that the sums have to be remembered figure by figure, and combinations thereof made.⁵ There is no hard and fast rule governing all the cases, and whether or not a reference can be compelled, depends more upon the state of the pleadings and the discretion of the court, than upon any rules or definitions.

§ 6. It must be a Long Account.—The action must not only involve an account, but it must be a long account.⁶ As to what constitutes a long account the decisions are by no means uniform. One bill containing numerous items does not; it is in fact but one item.⁷ It has been held that four items do not,⁸ that five do not,⁹ that seven do not,¹⁰ that seven, all except three of the same date do not.¹¹ It has also been held that three items, some of them gross charges for work and labor do,¹² that twenty-six do.¹³ Where only two items of an account were disputed, one of which was an aggregate of small bills, a reference was ordered;¹⁴ so

¹ N. Y. Super. 1876, *Blackstone Bank v. Bogart*, 41 Super. 292.

² Sup'm. Ct. Sp. T. 1850, *Mills v. Thursby*, 11 How. 113.

³ Sup'm. Ct. Sp. T. 1856, *Jackson v. De Forrest*, 14 How. 81.

⁴ Sup'm. Ct. 1871, *Ludlow v. Am. Exch. Bank* 59 Barb. 509.

⁵ N. Y. Super. 1874, *Ronaldo v. Mechanics' Bank*, 37 Super. 208.

⁶ Code Civ. Proc. § 1013.

⁷ Sup'm. Ct. 1874, *Brink v. Republic Co.*, 2 T. & C. 550; Sup'm. Ct. 1863, *Stevenson v. Buxton*, 37 Barb. 15; 15 Abb. 352; N. Y. Super. Sp.

T. 1886, *Rose v. Mayor*, 32 How. 164; 2 Abb. N. S. 266.

⁸ Sup'm. Ct. 1884, *Parker v. Snell*, 10 Wend. 577.

⁹ Sup'm. Ct. 1865, *Dickinson v. Mitchell*, 19 Abb. 286.

¹⁰ Com. Pl. 1863, *Harris v. Mead*, 16 Abb. 257.

¹¹ Sup'm. Ct. Sp. T. 1846, *Smith v. Brown*, 3 How. 8.

¹² Com. Pl. 1870, *Thompson v. Seimer*, 40 How. 246.

¹³ 1873, *Welsh v. Darragh*, 52 N. Y. 590.

¹⁴ Sup'm. Ct. 1874, *Williams v. Allen*, 4 T. & C. 673.

where the action was for several items of damage at different times for breach of contract.¹

§ 7. **The Account must be Directly Involved.**—To authorize a compulsory reference the long account must be directly—not collaterally involved, must be the immediate object of the suit;² if any other issue must be tried before the long account can be reached, the motion for a reference must be denied.³ Where the action was on a contract which was denied, a reference was refused, although a long account was collaterally involved;⁴ so where plaintiff must recover, if at all, on an account stated, although many items entered into the account;⁵ so where, in an action by an assignee of a copartnership it was alleged that a settlement which had been made was procured by fraud, which was denied;⁶ so where in an action by the receiver of a corporation to recover a dividend wrongfully paid it was necessary to examine the assets and accounts;⁷ so where sales and amounts were admitted, and the only question was through whom the sales were made, and the amounts received;⁸ so where in an action for a sum certain for services, and a balance for

¹ 1881, *Chambers v. Appleton*, 84 N. Y. 649.

² 1881, *Camp v. Ingersoll*, 86 N. Y. 433; Ct. App. 1870, *Kain v. Delano*, 11 Abb. N. S. 29; Sup'm. Ct. 1838, *Dedericks Adm'rs. v. Richley*, 19 Wend. 108; Sup'm. Ct. 1837, *Silmser v. Redfield*, 19 Wend. 21; Sup'm. Ct. Sp. T. 1859, *Cameron v. Freeman*, 18 How. 310; N. Y. Super. 1861, *Whittaker v. Desfosse*, 20 Super. 678; Sup'm. Ct. Sp. T. 1854, *Keeler v. Poughkeepsie Co.* 10 How. 11; Sup'm. Ct. 1879, *Keep v. Keep*, 58 How. 139; Ct. App. 1870, *Townsend v. Hendricks*, 40 How. 143; Com. Pl. 1883, *Streat v. Rothschild*, 12 Abb. N. C. 382; Com. Pl. 1867, *Turner v. Taylor*, 2 Daly, 278; Sup'm. Ct. Sp. T. 1852, *Graham v. Golding*, 7 How. 260; N. Y. Super. 1874, *DeGraff v. McKinley*, 38 Su-

per. 203; Com. Pl. 1874, *Magown v. Sinclair*, 5 Daly, 63; Sup'm. Ct. Sp. T. 1866, *Bushnell v. Eastman*, 2 Abb. N. S. 411; Sup'm. Ct. 1885, *Clafin v. Drake*, 38 Hun. 144.

³ Sup'm. Ct. 1885, *Clafin v. Drake*, 38 Hun. 144; Ct. App. 1870, *Kain v. Delano*, 11 Abb. N. S. 29; Com. Pl. 1874, *Magown v. Sinclair*, 5 Daly, 63.

⁴ Sup'm. Ct. 1879, *Keep v. Keep*, 58 How. 139.

⁵ N. Y. Super. 1877, *Rowell v. Giles*. 53 How. 244.

⁶ Sup'm. Ct. Sp. T. 1859, *Cameron v. Freeman*, 10 Abb. 333; 18 How. 310.

⁷ Sup'm. Ct. 1878, *Wickham v. Frazee*, 13 Hun. 431.

⁸ Com. Pl. 1874, *Magown v. Sinclair*, 5 Daly, 63.

work and labor, the answer denied the claims and demanded damages for plaintiff's fraud;¹ but where plaintiff renders an account embracing many items which defendant admitted, but set up other matter involving proof of value, a reference was ordered, on the ground, it would seem, that where the account is any way assailed, the cause is referable;² so when the action was on a contract to furnish power and room, defendants to make advances, the issue being whether advances were made;³ so where the action was for procuring endorsements on a large number of notes,⁴ but an action on a special contract to do certain work for a specified sum does not involve a long account though several items of performance have to be proved,⁵ nor does one for damages, for failure to fulfill a contract to complete houses within a certain time, although numerous particulars must be shown.⁶ It is immaterial whether the account is introduced by the complaint or answer,⁷ though the one brought in by answer is equitable in its nature.⁸ Where, in mandamus proceedings the return and answer show that a long account is involved a reference may be ordered;⁹ so where, in an action to dissolve a partnership the answer alleges that an account had been taken, since which no contract had been made;¹⁰ but where, in an action for an accounting by a partner the answer admits the partnership and sets up a release to which the plaintiff replies alleging fraud in obtaining the release, the account is collateral;¹¹ so in an action to open an account stated and for a new accounting¹² in these, and

¹ Sup'm. Ct. 1875, *Miner v. Gardiner*, 6 T. & C. 343.

² Sup'm. Ct. 1876, *Cowden v. Trale*, 6 Hun. 532.

³ Com. Pl. 1854, *Smith v. Dodd*, 3 E. D. S. 348.

⁴ Com. Pl. Sp. T. 1859, *Master-ton v. Howell*, 10 Abb. 118.

⁵ N. Y. Super. 1873, *Evans v. Kalbfleisch*, 36 Super. 450.

⁶ Sup'm. Ct. 1876, *McDonnell v. Stevens*, 9 Hun. 28.

⁷ Code Civ. Proc. § 1013; N. Y. Super. 1876, *Blackstone Bank v. Bo-*

gart, 41 Super. 292; N. Y. Super. 1875, *Maryott v. Thayer*, 39 Super. 417; Sup'm. Ct. 1877, *Tooker v. Rinaldo*, 11 Hun. 154.

⁸ N. Y. Super. 1876, *Blackstone Bank v. Bogart*, 41 Super. 292.

⁹ Sup'm. Ct. Sp. T. 1881, *People v. Wadsworth*, 61 How. 57.

¹⁰ Com. Pl. 1878, *Kennedy v. Shilton*, 9 Abb. 157.

¹¹ Com. Pl. 1883, *Streat v. Rothchild*, 12 Abb. N. C. 383.

¹² Sup'm. Ct. Sp. T. 1867, *Mitchell v. Stewart*, 3 Abb. N. S. 250.

similar cases, the question whether plaintiff is entitled to an account is the real issue, and should first be tried.¹

§ 8. The Trial must not require the Decision of difficult Questions of Law.—A reference will not be ordered when the trial will require the decision of a difficult question of law, although a long account is directly involved ;² the questions of law are not confined to the facts presented by the issues ; they may grow out of their very character, and the evidence necessary to their investigation,³ or the difficulty of adjusting the equities between the parties.⁴ Where the pleadings show that a difficult question of law will arise, a reference will be refused.⁵

¹ Sup'm. Ct. 1859, *Pratt v. Stiles*, 17 How. 211; Sup'm. Ct. 1856, *Palmer v. Palmer*, 13 How. 363; Sup'm. Ct. 1857, *Luddington v. Taft*, 10 Barb. 447.

² Code Civ. Proc. § 1013; Com. Pl. 1874, *Magown v. Sinclair*, 5 Daly, 63; Sup'm. Ct. 1845, *Ives v. Vandewater*, 1 How. 168; N. Y. Super.

1875, *Patterson v. Stettauer*, 39 Super. 413.

³ N. Y. Super. 1866, *Goodyear v. Brooks*, 27 Super. 682; Sup'm. Ct. 1845, *Ives v. Vandewater*, 1 How. 168.

⁴ N. Y. Super. 1867, *Wheeler v. Falconer*, 30 Super. 45.

⁵ Sup'm. Ct. 1825, *Shaw v. Ayrs*, 4 Cow. 52.

CHAPTER IV.

COMPULSORY REFERENCE.

SECTION 1.—Compulsory reference, application for, how made.

SECTION 2.—Moving papers, contents.

SECTION 3.—Application for, how resisted.

SECTION 4.—What objections must be raised on motion.

SECTION 5.—Stipulation to defeat reference.

§ 1. **Compulsory Reference, Application for, How Made.**—A motion for a reference is a non-enumerated motion,¹ and must be made at special term on notice ;² if made at circuit it cannot be made until the cause reached on the calendar, unless notice be given, or both parties heard.³ If, when the case is called at circuit, it appears from the inspection of the pleadings that a long account is involved, or if after the trial is begun it so appears, the court may, of its own motion, take the case from the jury and send it to a referee.⁴ The motion cannot be made until the cause is ready for trial,⁵ but may be as soon as issue is joined ; the moving party is not bound to wait to see if his opponent will amend.⁶ But one reference will be ordered in cross-suits.⁷ The motion can be made at circuit only when the cause is on the calendar and ready for trial, and the object

¹ Sup'm. Ct. 1850, *Conway v. Hitchins*, 9 Barb. 378. 1867, *Wheeler v. Falconer*, 30 Super. 45 ; Sup'm. Ct. 1824, *Jansen v.*

² Sup'm. Ct. 1850, *Conway v. Hitchins*, 9 Barb. 378 ; Rule 38 ; Sup'm. Ct. Sp. T. 1864, *Scudder v. Snow*, 29 How. 95. Tappen, 3 Cow. 34 ; Sup'm. Ct. Sp. T. 1846, *Dutcher v. Wilgers*, 2 How. 180 ; N. Y. Super. 1866, *Goodyear v. Brooks*, 27 Super. 682 ; 2 Abb. N. S. 296.

³ Sup'm. Ct. 1837, *McCoun v. Rowley*, 19 Wend. 85.

⁴ Sup'm. Ct. 1864, *Holmes v. Bennett*, 28 How. 289.

⁵ Sup'm. Ct. 1860, *Hawkins v. Avery*, 32 Barb. 551 ; N. Y. Super.

⁶ Sup'm. Ct. Sp. T. 1849, *Enos v. Thomas*, 4 How. 290.

⁷ Sup'm. Ct. 1804, *Codwise v. Hacker*, 2 Cai. 251 ; Sup'm. Ct. 1830, *Hart v. Trotter*, 4 Wend. 198.

is to prevent a trial.¹ Where defendant in an action on a long account waited until the cause was on the day calendar, and then moved before another judge, the motion was properly denied on the ground of laches.² A refusal to refer, at trial term, is an order, though no formal order is entered, and the question is *res adjudicata*.³ Where the propriety of a reference is shown on the trial the cause may be taken from the jury, but should be finally so taken;⁴ delay in moving may defeat the motion.⁵

§ 2. **Moving Papers, Contents.**—The affidavit on motion for a compulsory reference should be made by a party; if made by the attorney a sufficient reason therefor should be given,⁶ unless the pleadings are made part of the moving papers, in which case the affidavit may be made by the attorney.⁷ The papers should show the nature of the action, and that it is in a condition to be referred;⁸ it must be made clearly to appear from the pleadings, or affidavit, or both, that a long account is necessarily involved; facts must be stated; a naked allegation to that effect is insufficient.⁹ An affidavit in an action by an attorney for his fees and services, alleging that plaintiff has prosecuted and defended several suits, drawn various instruments, and counselled and advised in various matters, is insufficient.¹⁰ It

¹ N. Y. Super. 1867, *Wheeler v. Falconer*, 30 Super. 45. How. 164, Sup'm. Ct. 1846, *Bolton v. McCullough*, 2 How. 165.

² Sup'm. Ct. 1875, *Mayor v. Genet*, 4 Hun, 658; 67 Barb. 275.

⁷ Sup'm. Ct. 1864, *Holmes v. Bennett*, 28 How. 289.

³ N. Y. Super. 1867, *Wheeler v. Falconer*, 30 Super. 45.

⁸ N. Y. Super. 1867, *Wheeler v. Falconer*, 30 Super. 48; Sup'm. Ct. 1864, *Holmes v. Bennett*, 28 How. 289.

⁴ N. Y. Super. 1856, *Bachman v. Cheeseborough*, 12 Super. 238; Sup'm. Ct. 1857, *Church v. Freeman*, 16 How. 294.

⁹ Ct. App. 1870, *Kain v. Delano*, 11 Abb. N. S. 29; N. Y. Super. Sp. T. 1874, *Lord v. Conner*, 48 How. 95; N. Y. Super. 1874, *De Graff v. McKinley*, 38 Super. 203; Sup'm. Ct. Cir. 1854, *Keeler v. Poughkeepsie Co.* 10 How. 11; N. Y. Super. 1866, *Betts v. Eagleton Co.* 1 N. Y. St. Rep. 241.

⁵ N. Y. Super. 1867, *Wheeler v. Falconer*, 30 Super. 45; Sup'm. Ct. 1875, *Mayor v. Genet*, 4 Hun, 658; 67 Barb. 275.

⁶ Sup'm. Ct. 1843, *Wood v. Crown-er*, 4 Hill, 548; Sup'm. Ct. 1845, *Mesick v. Smith*, 2 How. 7; Sup'm. Ct. 1846, *Ross v. Beecher*, 2 How. 157; Sup'm. Ct. 1846, *Little v. Bigelow*, 2

¹⁰ N. Y. Super. 1886, *Betts v. Eagleton Co.* 1 N. Y. Rep. 241; 10. Civ. Proc. 218.

must further be made to appear that a long account is directly, not incidentally, nor collaterally involved,¹ and that the taking of such account will dispose of all the rights of the parties.² The affidavit should also allege that the trial will not require the decision of difficult questions of law,³ although it has been held that this was matter of defense, and need not appear in the moving papers.⁴

§ 3. **Application for, how Resisted.**—The application may be resisted by showing, either from the moving papers or from the pleadings and affidavits, that the action does not belong to the class of referable causes,⁵ or by any matter that controverts the case made by the moving papers. If the trial will require the investigation of difficult questions of law the precise questions must be stated,⁶ and it must be made to appear that the questions are really difficult; a mere allegation to that effect is insufficient.⁷ Since references are never matters of right, but always of discretion,⁸ any matter tending to move the discretion of the court to refuse the application is admissible. Where, from the pleadings and schedules, it is doubtful whether the cause is referable, a reference will be ordered if the moving party's allegation that a long account is involved is uncontradicted.⁹ Where the evident purpose is delay, the motion will be denied;¹⁰ so where, on a motion by defendant it is made to

¹ Ct. App. 1870, *Kain v. Delano*, 11 Abb. N. S. 29; 1881, *Camp v. Ingersoll*, 86 N. Y. 433.

² N. Y. Super. 1867, *Wheeler v. Falconer*, 30 Super. 45.

³ N. Y. Super. Sp. T. 1886, *Betts v. Eagleton Co.* 1 N. Y. St. Rep. 241.

⁴ Sup'm. Ct. Sp. T. 1855, *Barber v. Cromwell*, 10 How. 351.

⁵ Ct. App. 1870, *Kain v. Delano*, 11 Abb. N. S. 29; Ct. App. 1870, *Townsend v. Hendricks*, 40 How. 143; 1881, *Camp v. Ingersoll*, 86 N. Y. 433.

⁶ Sup'm. Ct. Sp. T. 1853, *Dewey v. Field*, 13 How. 437; Sup'm. Ct. 1803, *Lusher v. Walter*, 1 Cai. 149; Sup'm. Ct. 1810, *Salisbury v. Scott*,

6 Johns. 329; N. Y. Super. 1875, *Patterson v. Stettaner*, 39 Super. 413; Sup'm. Ct. 1826, *Anonymous*; 5 Cow. 423; Sup'm. Ct. 1825, *Shaw v. Ayrs*, 4 Cow. 52; N. Y. Super. Sp. T. 1875, *Ryan v. Atlantic Co.* 50 How. 321; Sup'm. Ct. Sp. T. 1855, *Barber v. Cromwell*, 10 How. 351.

⁷ Sup'm. Ct. 1826, *Anon.* 5 Cow. 423; Sup'm. Ct. 1825, *Shaw v. Ayrs*, 4 Cow. 52; Com. Pl. 1874, *Magown v. Sinclair*, 5 Daly, 63.

⁸ Ante, pp. 3, 12.

⁹ Sup'm. Ct. 1874, *Continental Co. v. Industrial Co.* 1 Hun, 118; 3 T. & C. 758.

¹⁰ Sup'm. Ct. 1875, *Mayor v. Genet*, 4 Hun, 658.

appear that the additional expense may work a wrong, or be oppressive.¹ The court may refuse to refer an attorney's action for services, although a long account is directly involved, where the claim is resisted on the ground that it is exorbitant and oppressive.² If the cause is referable, that it has once been tried by a jury is no answer to the application;³ nor, in a cause triable only by the court that the opposing party intends to move to have issues framed to be tried by a jury;⁴ nor that an order of arrest has been obtained on allegations of fraud in the complaint;⁵ nor that the trial will involve a question of fraud;⁶ nor that some of the causes of action are not referable.⁷ That plaintiff is insolvent and unable to pay the fees of the referee is no answer to the application;⁸ that the action is brought in bad faith is not;⁹ that a speedy trial may be had at special term or circuit is.¹⁰ Where the answer contains allegations of fraud a reference may be refused, although a long account is involved;¹¹ it will be refused where the account cannot be taken until other issues are determined;¹² but if any one of the issues involves a long account a reference may be ordered.¹³ The contrary has been held,¹⁴ but the decision of the court of appeals would seem to settle the question. In an attorney's action for services it may

¹ N. Y. Super. 1872, *Godfrey v. Williamsburg Co.* 12 Abb. N. S. 250.

² Sup'm. Ct. 1875, *Martin v. Windsor Co.* 10 Hun, 304; 70 N. Y. 101.

³ N. Y. Super, Sp. T. 1852, *Brown v. Bradshaw*, 8 How. 176.

⁴ N. Y. Super. 1866, *Goodyear v. Brooks*, 27 Super. 682.

⁵ N. Y. Super. Sp. T. 1862, *Atocha v. Garcia*, 15 Abb. 303.

⁶ 1873, *Welsh v. Darragh*, 52 N. Y. 590; N. Y. Super. 18, 1875, *Patterson v. Stettauer*, 39 Super. 413.

⁷ 1875, *Place v. Cheeseborough*, 63 N. Y. 315.

⁸ Sup'm. Ct. 1875, *Place v. Cheeseborough*, 4 Hun, 577.

⁹ Sup'm. Ct. 1875, *Place v. Cheeseborough*, 4 Hun, 577.

¹⁰ Sup'm. Ct. Chamb. 1886, *Rochester v. Mayor*, 3 How. N. S. 527; 9 Civ. Proc. 226; N. Y. Super. Sp. T. 1872, *Godfrey v. Williamsburg Co.*, 12 Abb. N. S. 250.

¹¹ Sup'm. Ct. 1875, *Martin v. Windsor Co.* 10 Hun, 304; 70 N. Y. 101; N. Y. Super. 1866, *Goodyear v. Brooks*, 2 Abb. N. S. 296; N. Y. Super. Sp. T. 1872, *Godfrey v. Williamsburg Co.* 12 Abb. N. S. 250.

¹² Ct. App. 1870, *Kain v. Delano*, 11 Abb. N. S. 29; 1881, *Camp v. Ingersoll*, 86 N. Y. 433.

¹³ 1875, *Place v. Cheeseborough*, 63 N. Y. 315.

¹⁴ N. Y. Super. 1873, *Evans v. Kalbfleisch*, 16 Abb. N. S. 13.

be shown that they were rendered under a special contract to render the services for a sum certain,¹ or that a gross sum is charged for numerous items.² Where the principal issue is whether or not a contract has been performed, a reference will not be ordered simply because, to show performance, numerous items have to be proved.³ The burden of proof is on the moving party. Any matter that tends to show that for any reason the cause is not referable may be used in opposition. That one of the parties is a receiver is not a ground for denying the motion.⁴ The question of power is always involved.⁵

§ 4. **What Objections Must be raised on Motion.**—The objection that the issue involving a long account is immaterial, must be taken when the motion is made;⁶ so must one that the order was made by the wrong branch of the court,⁷ or that the cause is not ready for trial,⁸ or that the cause is not at issue as to all the parties;⁹ so of an objection to the person named as referee,¹⁰ or that other necessary parties have not been served with process.¹¹ If, in substituting one referee for another, the order directs that the evidence already taken be received before the substituted referee, the objection is waived by failure to object, or to appeal from the order,¹² but proceeding with the reference does not waive the right to move to set aside an order the court had no power to grant.¹³

¹ N. Y. Super. 1873, *Evans v. Kalbfleisch*, 16 Abb. N. S. 13; Com. Pl. Chamb. 1883, *Hull v. Allen*, 66 How. 124.

² N. Y. Super. 1881, *Davis v. Walsh*, 48 Super. 515.

³ N. Y. Super. 1874, *DeGraff v. McKinley*, 38 Super. 203; Sup'm. Ct. 1879, *Keep v. Keep*, 58 How. 139.

⁴ Sup'm. Ct. 1880, *Dunkin v. Sharp*, 22 Hun, 132.

⁵ N. Y. Super. 1874, *Ross v. Combs*, 37 Super. 289; Ct. App. 1870, *Kain v. Delano*, 11 Abb. N. S. 29; 1873, *Welsh v. Darragh*, 52 N. Y. 592; Ct. App. 1870, *Townsend v. Hendricks*, 40 How. 143.

⁶ Sup'm. Ct. 1870, *Lawless v. O'Mahony*, 9 Abb. N. S. 44.

⁷ 1862, *Forrest v. Forest*, 25 N. Y. 501.

⁸ Sup'm. Ct. 1860, *Hawkins v. Avery*, 32 Barb. 551.

⁹ Sup'm. Ct. 1860, *Hawkins v. Avery*, 32 Barb. 551.

¹⁰ Sup'm. Ct. Sp. T. 1857, *Billings v. Vanderbeck*, 15 How. 295; 1885, *Durant v. O'Brien*, 2 How. N. S. 313.

¹¹ Sup'm. Ct. 1860, *Hawkins v. Avery*, 32 Barb. 551.

¹² N. Y. Super. 1887, *Griffin v. Miner*, 54 Super. 46.

¹³ Sup'm. Ct. 1874, *Brink v. Republic Co.* 2 T. & C. 550.

§ 5. **Stipulation to Defeat Reference.**—Where, in a referable action, the opposing party offers a stipulation to defeat a reference, the court may prescribe the form of the stipulation.¹ In an action for goods sold embracing twenty items, the sale whereof was denied, the order of reference was reversed upon defendants stipulating not to question number, price, or value of the goods;² where, on an account of four items, defendant offered to admit all but one, a reference was refused;³ where, on appeal from the order of reference in an action by an attorney for services, the defendant stipulates to admit performance and value, the order will be reversed;⁴ so where the opposing party offers to admit the items if held liable therefor.⁵ Where, in a referable case the opposing party stipulates not to question the number, character, or value of the items making up the account, a reference was ordered;⁶ where the action was to recover money obtained by false credits, and plaintiff offered to stipulate to claim only the amount actually received, a reference was ordered;⁷ but an offer, in an attorney's action for services, to admit the rendering and value conditioned upon a favorable decision of an appeal from the order of reference cannot be allowed.⁸ The stipulation should be read on the hearing of the motion.

¹ Sup'm. Ct. 1875. *McAndrew v. Place*, 5 Hun, 285.

² Sup'm. Ct. 1869, *Siegel v. Heid*, 36 How. 506.

³ Sup'm. Ct. Sp. T. 1846, *Mullin v. Kelly*, 3 How. 12.

⁴ Com. Pl. 1874, *Dittenhoefer v. Lewis*, 5 Daly, 72.

⁵ N. Y. Super. 1883, *Day v. Jamieson*, 49 Super. 373.

⁶ 1875, *Welsh v. Darragh*, 52 N. Y. 590.

⁷ Sup'm. Ct. 1874, *Brush v. Galt*, 2 Hun, 678.

⁸ Sup'm. Ct. 1880, *Carr v. Berdell*, 22 Hun, 130.

CHAPTER V.

ORDER OF REFERENCE.

SECTION 1.—Selection of referee.

SECTION 2.—Order, form and contents.

SECTION 3.—Reviewing the order.

§ 1. **Selection of Referee.**—In an action to annul a marriage, or for a divorce or a separation; or an action against a corporation, to obtain a dissolution thereof, or the appointment of a receiver of its property, unless it is brought by the attorney-general; or an action wherein a defendant to be affected by the result of the trial is an infant, the court must designate the referee.¹ In all other actions the parties may by stipulation select him;² if the referee named in the stipulation refuses to serve, or if a new trial of an action tried by a referee so named is granted, the court must appoint another unless the stipulation expressly provides otherwise,³ if the parties cannot agree upon a referee the court may appoint one.⁴ Where the selection is made by the parties, any number not exceeding five, may be appointed,⁵ when by the court, one or three may be designated.⁶ The court may in a proper case increase the number from one to three, but the motion therefor must be made at special term on notice.⁷ The general term in affirming an order of reference cannot increase the number;⁸ nor, where the cause has been referred to one, will the special term entertain repeated applications for increase.⁹ When more than one is appointed, the order

¹ Code Civ. Proc. 1011, 1012.

² Code Civ. Proc. § 1011.

³ Code Civ. Proc. § 1011.

⁴ Code Civ. Proc. § 1011.

⁵ Code Civ. Proc. § 1025.

⁶ Code Civ. Proc. § 1025.

⁷ Com. Pl. 1880, *Devlin v. Mayor*,

⁹ Daly, 334.

⁸ Com. Pl. 1880, *Devlin v. Mayor*,

⁹ Daly, 334.

⁹ Com. Pl. 1883, *Devlin v. Mayor*.

11 Daly, 363.

should provide for reducing the number should a trial before all prove impracticable.¹ The qualifications of referees appointed by a compulsory order are the same as of those appointed by consent.²

§ 2. **Order, Form and Contents.**—The form of the order and the manner of entry is the same as in references by consent;³ the referee may be selected by the parties or by the court;⁴ if by the parties any number not exceeding five may be appointed; if by the court one or three.⁵ The qualifications of referees are the same as in references by consent;⁶ the court has no authority to direct that the hearing proceed on less than the statutory notice.⁷ The order should state precisely what is referred. An order referring "this cause" embraces all the issues,⁸ including, in an action for accounting, the right to proceed and take the account without the entry of an interlocutory judgment;⁹ in an action to dissolve a partnership the right to order a dissolution and the appointment of a receiver to take possession and dispose of the assets;¹⁰ in an action for dower, where the complaint prays, if admeasurement be impracticable, the property may be sold, to try the question of practicability, and in a proper case order a sale.¹¹ When the parties reside at different places the order may direct that hearings be had at each.¹² The special term may

¹ Com. Pl. Sp. T. 1880, *Devlin v. Mayor*, 62 How. 260.

² Ante. § 3, p. 6.

³ Ante, pp. 9, 10.

⁴ Code Civ. Proc. §§ 1011, 1025; Sup'm. Ct. 1884, *Hale v. Swinburne*, 17 Abb. N. C. 381.

⁵ Code Civ. Proc. §. 1025.

⁶ Ante, p. 9.

⁷ Sup'm. Ct. 1874, *Mohrman v. Bush*, 2 Hun, 674.

⁸ N. Y. Super. 1849, *Renouil v. Harris*, 4 Super. 641; Sup'm. Ct. Sp. T. 1850, *Graves v. Blanchard*, 4 How. 300; Sup'm. Ct. 1840, *Lee v. Tillotson*, 24 Wend. 337.

⁹ N. Y. Super. 1862, *McCartan v.*

Van Syckel, 23 Super. 694; N. Y. Super. 1860, *Crosbie v. Leary*, 19 Super. 312; Sup'm. Ct. 1855, *Palmer v. Palmer*, 13 How. 363; Sup'm. Ct. 1874, *Mundorf v. Mundorf*, 1 Hun, 41; Sup'm. Ct. 1859, *Pratt v. Stiles*, 9 Abb. 150; 17 How. 211.

¹⁰ N. Y. Super. 1869, *Trufant v. Merrill*, 6 Abb. N. S. 462.

¹¹ Sup'm. Ct. 1886, *O'Dougherty v. Remington Co.* 1 N. Y. St. Rep. 523.

¹² Sup'm. Ct. Sp. T. 1847, *Pierce v. Voorhees*, 3 How. 111; Sup'm. Ct. 1807, *Newland v. West*, 2 Johns. 188; Sup'm. Ct. 1884, *O'Brien v. Catskill Co.* 32 Hun. 636.

modify its order by increasing the number of referees, although the original order has been affirmed by the court of appeals, and no new facts are alleged to have arisen.¹ Motion costs may be allowed on granting the order.²

§ 3. **Reviewing the Order.**—The proper method of reviewing the order is by appeal;³ sometimes a motion to set it aside will be entertained.⁴ If the order is wholly void, the remedy is by appeal or refusal to attend before the referee.⁵ An appeal from the judgment entered on the report does not bring up the order; the appeal must be from the order,⁶ within thirty days after notice of entry;⁷ but where, in a non-referable case an order of reference was made by default, a motion to open the default denied, and an appeal taken from the order of denial, the default was opened and the order of reference vacated, although the reference had proceeded to a final report against the objection of the defendant.⁸ The order affects a substantial right, and so may be reviewed by the court of appeals.⁹ That court will not review the discretion of the court below in granting or refusing a reference in a referable case,¹⁰ but the general term may.¹¹ Such discretion will rarely be exercised in a refer-

¹ Com. Pl. 1880, *Devlin v. Mayor*, 9 Daly, 334; 90 N. Y. 689.

² 1872, *Watson v. Gardiner*, 50 N. Y. 671.

³ Sup'm. Ct. 1803, *Coombs v. Wyckoff*, 1 Cal. 147; N. Y. Super. 1866, *Brown v. Brown*, 27 Super. 688.

⁴ Sup'm. Ct. 1874, *Brink v. Republic Co.* 2 T & C. 550.

⁵ 1878, *Baird v. Mayor*, 74 N. Y. 382; Sup'm. Ct. Sp. T. 1852, *Haner v. Bliss*, 7 How. 246.

⁶ Sup'm. Ct. 1870, *Terry v. McNeil*, 58 Barb. 241; 1878, *Baird v. Mayor*, 74 N. Y. 382; Com. Pl. 1886, *McCall v. Moschowitz*, 1 N. Y. St. Rep. 99; Sup'm. Ct. 1879, *Elliott v. Lewis*, 16 Hun, 581.

⁷ Code Civ. Proc. § 1351.

⁸ Sup'm. Ct. 1883, *Read v. Lozier*, 31 Hun, 286.

⁹ Ct. App. 1870, *Townsend v. Hendricks*, 40 How. 143; Ct. App. 1870, *Kain v. Delano*, 11 Abb. N. S. 29; 1873, *Welsh v. Darragh*, 52 N. Y. 590; 1877, *Martin v. Windsor Hotel Co.* 70 N. Y. 101; Sup'm. Ct. 1877, *Hoffman v. Spalding*, 12 Hun, 83; Sup'm. Ct. 1865, *Dickinson v. Mitchell*, 19 Abb. 286.

¹⁰ 1873, *Welsh v. Darragh*, 52 N. Y. 590; 1877, *Martin v. Windsor Co.* 70 N. Y. 101; 1881, *Harrington v. Bruce*, 84 N. Y. 103.

¹¹ 1877, *Martin v. Windsor Co.* 70 N. Y. 101; Com. Pl. 1867, *Turner v. Taylor*, 2 Daly, 278; Sup'm. Ct. 1874, *Williams v. Allen*, 48 How. 357; Sup'm. Ct. 1879, *Elliott v. Lewis*, 16 Hun, 581; Sup'm. Ct. 1877, *Felt v. Tiffany*, 11 Hun, 62; Sup'm. Ct. 1874, *Flanders v. Odell*, 2 Hun, 664.

able case;¹ nor will the decision of the special term that an account is long be often reversed.² Objection to the order must be promptly taken; proceeding thereunder without objection waives every right, including the right to appeal;³ so does excepting to the report;⁴ but does not waive the objection that the court has no jurisdiction.⁵ A party who has sworn to a long account, appeared on the motion to refer, and appeared on the trial, waives his right to raise the objection that the cause was not referable;⁶ all irregularities are waived by proceeding with the reference.⁷

¹ Com. Pl. 1858, *Kennedy v. Shelton*, 1 Hilt. 546; Sup'm. Ct. 1853, *Dean v. Empire Co.* 9 How. 69; Com. Pl. 1854, *Smith v. Dodd*, 3 E. D. S. 348; Com. Pl. 1865, *Hatch v. Wolf*, 30 How. 65; Com. Pl. 1856, *Ubsdell v. Root*, 1 Hilt. 173; N. Y. Super, 1861, *Whittaker v. Desfosse*, 20 Super. 678; Sup'm. Ct. 1883, *Stebbins v. Cowles*, 66 How. 28.

² Sup'm. Ct. 1874, *Williams v. Allen*, 2 Hun, 377; N. Y. Super. 1874, *Hossack v. Heyerdahl*, 38 Super. 391.

³ Sup'm. Ct. Sp. T. 1851, *Keator v. Ulster Co.*, 7 How. 41; Com. Pl. 1856, *Ubsdell v. Root*, 1 Hilt. 173; Sup'm. Ct. 1803, *Conant v. Wyckoff*, 1 Cal. 147; N. Y. Super. 1866,

Brown v. Brown, 27 Super. 688; 31 How. 481; 1878, *Baird v. Mayor*, 74 N. Y. 382; Sup'm. Ct. 1851, *Whalen v. Supervisors*, 6 How. 278.

⁴ N. Y. Super. 1866, *Brown v. Brown*, 27 Super. 688.

⁵ Sup'm. Ct. 1848, *Garcie v. Sheldon*, 3 Barb. 232.

⁶ Sup'm. Ct. 1833, *Bloore v. Potter*, 9 Wend. 480; Sup'm. Ct. 1879, *Elliott v. Lewis*, 16 Hun, 581.

⁷ Sup'm. Ct. 1868, *Bucklin v. Chapin*, 35 How. 155; Sup'm. Ct. Sp. T. 1848, *Garcie v. Sheldon*, 3 Barb. 232; Sup'm. Ct. 1860, *Bonner v. McPhail*, 31 Barb. 106; N. Y. Super. Sp. T. 1867, *Quin v. Lloyd*, 30 Super. 157.

CHAPTER VI.

GENERAL POWERS AND DUTIES OF REFEREE.

SECTION 1.—Authority of court over referee.

SECTION 2.—Oath of referee.

SECTION 3.—Bringing on the trial.

SECTION 4.—Conduct of the trial.

§ 1. **Authority of Court over Referee.**—A referee is the creature of the statute and order, and possesses no greater jurisdiction or power than is delegated to him thereby.¹ He is always under control of the court, and may be removed at its discretion for proper cause;² such discretion in removing, or refusing to remove a referee who is in no way impeached will not be reviewed on appeal,³ nor will alleged error in rulings on a trial, though claimed to show bias, be a sufficient cause for removal.⁴ The special term may compel the referee to proceed with the trial of the issues on pain of removal;⁵ in a proper case may stay proceedings before him;⁶ may in certain cases, and for good reasons, control his acts and proceedings, set aside his report, or stay proceedings thereon;⁷ may set aside the report for irregularity, or open the case for re-trial on the ground of surprise, mistake, or newly discovered evidence;⁸ but will review his discretion only in cases of incompetency or impropriety.⁹ The referee is an officer of the court, and no

¹ N. Y. Super. Sp. T. 1877, *Sullivan v. Sullivan*, 52 How. 453.

² Sup'm. Ct. Sp. T. 1868, *Ford v. Ford*, 53 Barb. 525.

³ Com. Pl. 1851, *Perry v. Moore*, 2 E. D. S. 32.

⁴ N. Y. Super. Sp. T. 1884, *Marie v. Garrison*, 1 How. N. S. 32.

⁵ Sup'm. Ct. Sp. T. 1868, *Ford v. Ford*, 53 Barb. 525.

⁶ Sup'm. Ct. 1823, *Sudam v. Swart*,

20 Johns, 476; Sup'm. Ct. 1831, *Grahams v. Norton*, 6 Wend. 552.

⁷ Com. Pl. 1870, *Barton v. Herman*, 3 Daly, 320; 8 Abb. N. S. 399.

⁸ Sup'm. Ct. 1859, *Pratt v. Stiles*, 9 Abb. 150; 17 How. 211.

⁹ N. Y. Super. 1877, *Dow v. Daragh*, 42 Super. 81; N. Y. Super. Sp. T. 1884, *Marie v. Garrison*, 1 How. N. S. 32.

suit can be brought against him for moneys in his hands as such officer without leave.¹ Where the referee unreasonably grants an adjournment, or refuses to proceed with the reference, he may be removed and another appointed;² the special term may set aside any order of the referee that he had no authority to make;³ but it will not stay the progress of a trial before him to allow an examination of defendant before trial;⁴ it cannot compel him to re-open the case and hear further evidence.⁵

§ 2. **Oath of Referee.**—Before proceeding to hear the testimony, the referee must be sworn faithfully and fairly to try the issues, and make a just and true report;⁶ the oath must be administered by an officer designated by law.⁷ The provisions of Section 1016 relate solely to referees appointed under Sections 1011 to 1015 inclusive, relating to trials without a jury,⁸ and to references under section 1015 of the code of civil procedure;⁹ if the referee was sworn before one of the attorneys in the cause, the only effect is that the oath was not taken; the judgment is not vitiated;¹⁰ it is a mere irregularity that is waived by proceeding in the action.¹¹ Attending and refusing to proceed does not waive the oath.¹² Failure to take the oath will not vitiate a judgment entered on the report of the referee,¹³ except when infants are concerned. In such case there can be no waiver.¹⁴

¹ Sup'm. Ct. 1864, *Higgins v. Wright*, 43 Barb. 461.

² N. Y. Super. 1858, *Forrest v. Forrest*, 16 Super. 650.

³ Sup'm. Ct. Sp. T. 1868, *Ford v. Ford*, 53 Barb. 525.

⁴ Sup'm. Ct. Chamb. 1877, *Richardson v. McCreery*, 1 Abb. N. C. 355.

⁵ N. Y. Super. 1877, *Dow v. Darragh*, 42 Super. 80.

⁶ Code Civ. Proc. § 1016.

⁷ Code Civ. Proc. § 842.

⁸ Com. Pl. 1878, *Nason v. Luddington*, 8 Daly, 149; 56 How. 172; Com. Pl. Sp. T. 1878, *Exchange Co. v. Early*, 4 Abb. N. C. 78; 54 How. 279.

⁹ Com. Pl. Sp. T. 1878, *Exchange Co. v. Early*, 4 Abb. N. C. 78.

¹⁰ Sup'm. Ct. 1882, *Katt v. Germania Co.*, 26 Hun, 429.

¹¹ Sup'm. Ct. Sp. T. 1851, *Keator v. Ulster Co.*, 7 How. 41; Sup'm. Ct. 1851, *Whalen v. Supervisors*, 6 How. 278; Com. Pl. 1878, *Nason v. Luddington*, 8 Daly, 149; 56 How. 172.

¹² Sup'm. Ct. Sp. T. 1878, *Browning v. Marvin*, 5 Abb. N. C. 285.

¹³ Code Civ. Proc. 721.

¹⁴ Code Civ. Proc. § 1016; Com. Pl. Sp. T. 1878, *Exchange Co. v. Early*, 4 Abb. N. C. 78; 54 How. 279.

§ 3. **Bringing on the Trial.**—The referee should take no steps until he has received a certified copy of the order of reference;¹ this is his commission, the sole source of his authority.² Although it is the better practice, it is not necessary that the order should be served on the opposite party; he had notice of the application, he is bound to take notice of the decision.³ The referee should fix the time and place of trial;⁴ if more than one referee is appointed a majority may do so.⁵ The appointment of hearing should be in writing, but a verbal one is sufficient.⁶ In actions in the supreme court it is not necessary that the trial should be had in the county where the venue is laid;⁷ whether an objection that the trial was had outside the jurisdiction of the court is ever valid, *quere*;⁸ in one case the objection was held fatal,⁹ but this would seem to be overruled by the later decision of the court of appeals. The objection is waived if not taken promptly.¹⁰ Fourteen days notice of the time and place of trial is a matter of right,¹¹ unless waived, a shorter notice will not sustain a judgment by default;¹² but where the objecting party has attended and secured an adjournment, the proceedings will not be set aside because the reference proceeded on two days notice;¹³ the court cannot shorten the notice except as a condition of granting a favor.¹⁴ Erroneous statements of the referee as

¹ Sup'm. Ct. 1860, *Bonner v. McPhail*, 31 Barb. 106.

² Sup'm. Ct. 1860, *Bonner v. McPhail*, 31 Barb. 106; Sup'm. Ct. Sp. T. 1871, *Merrill v. Merrill*, 11 Abb. N. S. 74; Sup'm. Ct. Sp. T. 1858, *Billings v. Baker*, 6 Abb. 213.

³ Sup'm. Ct. Sp. T. 1845, *Moffatt v. Judd*, 1 How. 194.

⁴ Sup'm. Ct. Sp. T. 1859, *Sage v. Mosher*, 17 How. 367; County Ct. Otsego Co., 1853, *Stephens v. Strong*, 8 How. 339.

⁵ Code Civ. Proc. § 1026.

⁶ Sup'm. Ct. Sp. T. 1859, *Sage v. Mosher*, 17 How. 367; Sup'm. Ct. Sp. T. 1853, *Stephens v. Strong*, 8 How. 339.

⁷ Sup'm. Ct. 1807, *Newland v.*

West, 2 Johns, 188; Sup'm. Ct. Sp. T. 1855, *Wheeler v. Maitland*, 12 How. 35; 1879, *Blake v. Lyon Co.*, 77 N. Y. 626.

⁸ 1879, *Blake v. Lyon Co.*, 77 N. Y. 626.

⁹ Sup'm. Ct. 1860, *Bonner v. McPhail*, 31 Barb. 106.

¹⁰ 1879, *Blake v. Lyon Co.*, 77 N. Y. 626.

¹¹ Code Civ. Proc. § 1018; Sup'm. Ct. 1874, *Mohrman v. Bush*, 2 Hun. 674.

¹² Sup'm. Ct. 1874, *Mohrman v. Bush*, 2 Hun. 674.

¹³ Com. Pl. Sp. T. 1854, *Wetter v. Schlieper*, 7 Abb. 92; Chancery, 1833, *Hart v. Small*, 4 Paige. 288.

¹⁴ Com. Pl. 1870, *Leland v. Smith*, 3 Daly, 309.

to time and place of meeting will not excuse the want of attendance at the time and place specified in a written notice.¹ A party who has appeared by attorney cannot thereafter appear in person.² If he appears without objection at a place other than that specified in the notice, the irregularity is waived;³ appearing and proceeding without objection is a waiver of insufficient notice.⁴

§ 4. **Conduct of the Trial.**—A trial before a referee of an issue of fact, or an issue of law, is conducted in like manner, the papers to be furnished are the same, and are furnished in like manner as when the trial is by the court without a jury.⁵ Where more than one referee is appointed all must meet together, and hear all the allegations and proofs of the parties; but a majority may appoint a time and place for the trial, decide any question that may arise on the trial, sign a report, or settle a case.⁶ A majority may hold the case for the others to appear.⁷ The referee must always be present during the examination of witnesses,⁸ but proceeding without objection in his absence waives the irregularity.⁹ He cannot refuse to proceed upon the ground that the order was improvidently granted;¹⁰ nor can defendant object on the hearing that the necessary parties have not been served with process,¹¹ or that the referee has no jurisdiction because the order was improperly granted.¹² The referee may dismiss the complaint on the ground that it does not state facts sufficient to constitute a cause of

¹ Sup'm. Ct. Sp. T. 1859, *Sage v. Mosher*, 17 How. 367.

² N. Y. Super. 1866, *Halsey v. Carter*, 29 Super. 535.

³ Sup'm. Ct. 1874, *Catlin v. Catlin*, 2 Hun. 378.

⁴ Com. Pl. Sp. T. 1854, *Wetter v. Schlieber*, 7 Abb. 92; *Chancery* 1816, *Ex'rs. v. Van Cortlandt*, 2 J. Ch. 242; *Chancery*, 1833, *Hart v. Small*, 4 Paige, 288.

⁵ Code Civ. Proc. § 1018.

⁶ Code Civ. Proc. § 1026.

⁷ Sup'm. Ct. Sp. T. 1846, *Sewall v. DeForrest*, 2 How. 176.

⁸ Code Civ. Proc. § 1018; Com. Pl. 1859, *Shultz v. Whitney*, 17 How. 471; N. Y. Super. 1871, *Metcalf v. Baker*, 34 Super. 10; 52 N. Y. 649; 11 Abb. N. S. 431.

⁹ N. Y. Super. 1871, *Metcalf v. Baker*, 34 Super. 10; 52 N. Y. 649; 11 Abb. N. S. 431.

¹⁰ Sup'm. Ct. 1862, *People v. Cortelyou*, 36 Barb. 164.

¹¹ Sup'm. Ct. 1860, *Hawkins v. Avery*, 32 Barb. 551.

¹² Sup'm. Ct. 1879, *Elliot v. Lewis*, 16 Hun, 581.

action ;¹ or on plaintiff's failure to appear ;² or to proceed with the action ;³ but judgment absolute should not be ordered ;⁴ may order judgment for plaintiff on the ground that the answer constitutes no defense.⁵ If plaintiff fails to appear the reference may proceed in his absence.⁶ If the cause is being tried the second time the referee is bound by the law as laid down by the appellate court in reviewing a previous trial.⁷ Plaintiff may submit to a non-suit, or a dismissal of his complaint, or his complaint may be dismissed in like manner as on a trial at any time before the case has been finally submitted for decision.⁸ A non-suit is error if there was evidence sufficient to carry the case to a jury.⁹ To make the decision of a referee in dismissing the complaint equivalent to a non-suit, the motion to dismiss should be decided at, or as of the time the motion was made, and before the final submission of the cause. If the non-suit is granted an exception should be taken, and all the matters made to appear, to secure a review in the court of appeals.¹⁰ The order of proof is within the discretion of the referee,¹¹ and, to some extent, the permitting of leading questions,¹² and the number of witnesses as to character.¹³ He cannot disregard the law as laid down by the courts ;¹⁴ nor can he in the absence of one party inspect property, the subject of the action, and

¹ 1868, *Coffin v. Reynolds*, 37 N. Y. 640 ; 1873, *Schuyler v. Smith*, 51 N. Y. 309 ; 1880, *Eaton v. Wills*, 82 N. Y. 576.

² Code Civ. Proc. § 1018 ; 1873, *Morange v. Meigs*, 54 N. Y. 207.

³ 1873, *Morange v. Meigs*, 54 N. Y. 207.

⁴ N. Y. Super. 1852, *Salter v. Malcolm*, 8 Super. 596.

⁵ 1878, *Schuyler v. Smith*, 51 N. Y. 309.

⁶ Sup'm. Ct. 1814, *McInery v. Benedict*, 11 Johns. 402 ; County Court, 1853, *Stephens v. Strong*, 8 How. 339 ; Sup'm. Ct. Sp. T. 1852, *Williams v. Sage*, 1 C. R. N. S. 358.

⁷ N. Y. Super. 1866, *Bellows v.*

Folsom, 27 Super. 43 ; 1871, *Clarkson v. Skidmore*, 46 N. Y. 297.

⁸ Rule 30.

⁹ 1872, *Scofield v. Hernandez*, 47 N. Y. 313.

¹⁰ 1877, *Vanderlip v. Keyser*, 68 N. Y. 443.

¹¹ Com. Pl. 1850, *Gibson v. Pearsall*, 1 E. D. S. 90.

¹² Com. Pl. 1854, *Brade v. Raymond*, 2 E. D. S. 496 ; Com. Pl. 1858, *Pearson v. Fiske*, 2 Hilt. 146.

¹³ Sup'm. Ct. 1848, *Green v. Brown*, 3 Barb. 119 ; 1873, *Armstrong v. Ferguson*, 54 N. Y. 659.

¹⁴ Sup'm. Ct. 1858, *Burt v. Powis*, 16 How. 289.

receive explanations thereof from the other party.¹ He has no power to strike out a complaint;² nor can he rely upon affidavits brought to him for testimony in the cause; he himself must take the evidence.³ He cannot strike out the direct examination of a party who refuses to appear for cross examination; the proper course is to report the facts to the court.⁴ Nor can he strike out a complaint for refusal to obey a subpoena *āuces tuem*;⁵ nor issue a commission to take testimony;⁶ nor order a bill of particulars.⁷ When a counter-claim is sustained he may state the account and give judgment for the balance found due;⁸ but where the complaint alleged a co-partnership and a dissolution, an ascertainment of the amount due, for which plaintiff sued, or in the alternative for an accounting, it was held that the action was in *assumpsit*, and that the referee had no right to take an account as in equity.⁹ Where two actions in different courts were referred to the same referee, who ordered that one should be first tried, and if decided in favor of plaintiff an accounting should be had to determine the amount due, defendant was entitled to an accounting in both suits.¹⁰ Where several actions are brought against the same defendant, and a stipulation that all shall depend on the result of one selected to be tried, in which plaintiff succeeds, defendant can offer evidence only as to the amount of damage in the others.¹¹ One of several referees cannot be a witness on a trial before them.¹² Parties brought in after the trial has begun cannot be compelled to accept the referee appointed, or the evidence

¹ Sup'm. Ct. Sp. T. 1849, *Yale v. Gwinits*, 4 How. 253.

² Sup'm. Ct. Sp. T. 1853, *Bone-steel v. Lynde*, 8 How. 226, 352.

³ Chancery 1839, *Banta v. Banta*, 3 Edw. Ch. 295.

⁴ Sup'm. Ct. 1881, *Matter of Crooks*, 23 Hun, 696.

⁵ Sup'm. Ct. Sp. T. 1853, *Bone-steel v. Lynde*, 8 How. 226.

⁶ N. Y. Super. 1872, *Rathbun v. Ingersoll*, 34 Super. 211.

⁷ Sup'm. Ct. 1875, *Weller v. Weller*, 4 Hun, 196.

⁸ 1871, *Stewart v. Drake*, 46 N. Y. 449.

⁹ Sup'm. Ct. 1870, *Short v. Barry*, 3 Lans, 143.

¹⁰ Sup'm. Ct. 1874, *Devoe v. Nutter*, 1 Hun, 713.

¹¹ Sup'm. Ct. 1853, *Houlahan v. R. R. Co.* 24 How. 155.

¹² Sup'm. Ct. 1851, *Morse v. Morse*, 11 Barb. 510.

taken;¹ nor in reversing a judgment and ordering a new trial; nor in substituting one referee for another, can the court order the trial to be had on the evidence taken, or direct what evidence shall be admitted.² Proceeding with the reference is a waiver of objection.³ Where amended pleadings have been served during an adjournment, the issues not being substantially changed, it is discretionary with the referee whether he will begin the trial anew;⁴ so when a trial has been adjourned for the purpose of allowing a reply to a counter-claim.⁵ He may hold the case to enable other necessary parties to be brought in, and where plaintiff refuses, on leave given, to make application therefor, may dismiss the action without prejudice.⁶ At any time before the report is filed or delivered he may re-open the case and take further evidence,⁷ of his own motion or on motion of either party;⁸ may enlarge the time for the submission of briefs after the case has been closed.⁹ In an action for waste the referee may, in his discretion, view the premises, and direct the attorneys to attend accordingly.¹⁰ Where in an equity case all the issues are referred to hear and determine the mode of procedure is in the discretion of the referee. If after trying the issues he finds an accounting necessary, he may proceed and take the account, or he may order an interlocutory judgment direct-

¹ 1880, *Wood v. Swift*, 81 N. Y. 31.

² Sup'm. Ct. 1860, *Bissell v. Hamlin*, 13 Abb. 22; N. Y. Super. 1886, *Griffin v. Miner*, 54 Super. 46.

³ N. Y. Super. 1886, *Griffin v. Miner*, 54 Super. 46; Sup'm. Ct. 1874, *Catlin v. Catlin*, 2 Hun, 378.

⁴ Sup'm. Ct. 1869, *White v. Smith*, 1 Lans, 469.

⁵ 1871, *White v. Smith*, 46 N. Y. 418.

⁶ 1882, *Peyser v. Wendt*, 87 N. Y. 322.

⁷ Sup'm. Ct. Cir. 1858, *Ayrault v. Sackett*, 17 How. 461; Com. Pl. 1854, *Duguid v. Ogilvie*, 1 Abb. 145; 2 E. D. S. 527; Com. Pl. 1858, *Pearson v. Fiske*, 2 Hilt, 146; Com. P. 1855, *Trimble v. Stilwell*, 4 E. D.

S. 513; 1859, *Williams v. Hays*, 20 N. Y. 58; Sup'm. Ct. 1862, *Leitch v. Brotherson*, 25 How. 407; 16 Abb. 384; N. Y. Super. 1877, *Dow v. Darragh*, 42 Super. 80.

⁸ Com. Pl. 1854, *Duguid v. Ogilvie*, 1 Abb. 145; 2 E. D. S. 527; Sup'm. Ct. Cir. 1858, *Ayrault v. Sackett*, 17 How. 461; Sup'm. Ct. 1843, *Parker v. French*, *Lalor Supp.* 103; Ct. App. 1867, *Fielden v. Lahens*, 6 Abb. N. S. 341; Com. Pl. 1854, *Beach v. Raymond*, 2 E. D. S. 496; N. Y. Super. 1861, *Delafield v. DeGrauw*, 22 Super. 1.

⁹ Sup'm. Ct. Sp. T. 1885, *Morrison v. Lawrence*, 2 How. N. S. 72.

¹⁰ Code Civ. Proc. 1659.

ing it to be taken;¹ he is not obliged to go on and take it himself.² Where defendant has offered to liquidate damages under section 736 of the Code of Civil Procedure the referee must, if he finds that the damages do not exceed the amount named, ascertain and determine the expense necessarily incurred in preparing for the trial of the question of damage.³ In an action to reform a contract on the ground of mistake the plaintiff cannot, on failure to prove mistake, have a construction of the contract.⁴ The original minutes of the referee after judgment are his private property with which the court has nothing to do.⁵ Where the evidence on the trial of a foreclosure action has been taken by a stenographer the minutes may be ordered to be filed.⁶

¹ Sup'm. Ct. 1864, *Mundorf v. Mundorf*, 1 Hun, 41; Sup'm. Ct. 1856, *Palmer v. Palmer*, 13 How. 363; N. Y. Super. Sp. T. 1879, *Hathaway v. Russell*, 45 Super. 539.
² 1874. *Mundorf v. Mundorf*, 59 N. Y. 635; Sup'm. Ct. 1886, *Central T. Co. v. N. Y. & N. Co.* 42 Hun, 602.

³ Code Civ. Proc. § 737.
⁴ 1887, *Oakville Co. v. Double Pointed T. Co.* 105 N. Y. 658.
⁵ Sup'm. Ct. 1882, *Horrocks v. Thompson*, 27 Hun, 144.
⁶ Sup'm. Ct. 1882, *Horrocks v. Thompson*, 27 Hun, 144.

CHAPTER VII.

POWERS AND DUTIES ON THE TRIAL.

SECTION 1.—Power to allow adjournments.

SECTION 2.—Procuring and taking evidence.

SECTION 3.—Reserving decision on objections to evidence.

SECTION 4.—Power to allow amendments.

SECTION 5.—Power to punish for contempt.

SECTION 6.—Motion to dismiss.

SECTION 7.—Requests to find.

SECTION 8.—Jurisdiction over costs.

§ 1. **Power to Allow Adjournments.**—The referee possesses the same power as the court on the trial to grant adjournments.¹ They are within his discretion;² the court will rarely interfere therewith;³ but it will vacate the order of reference if the referee insists upon granting one of several months to enable him to make a pleasure trip;⁴ and when the referee refused to adjourn to permit a witness to fulfill a professional engagement, and struck out the evidence previously given by such witness, the order confirming the report of the referee was reversed on appeal.⁵ He may adjourn from time to time on his own motion when necessary, of which necessity he is to judge,⁶ to enable a party to amend his pleading,⁷ or to serve a reply.⁸ Refusal to

¹ Code Civ. Proc. § 1018.

² 1880, *Comins v. Hetfield*, 80 N. Y. 261; Sup'm. Ct. 1867, *Billings v. Vanderbeck*, 15 How. 295; Sup'm. Ct. 1831, *Grahams v. Morton*, 6 Wend. 552.

³ Sup'm. Ct. Sp. T. 1860, *Cooley v. Huntington*, 16 Abb. 384 n; N. Y. Super. Sp. T. 1848, *Langley v. Hickman*, 3 Super. 681.

⁴ N. Y. Super. 1852, *Forrest v. Forrest*, 16 Super. 650.

⁵ Sup'm. Ct. 1881, *Matter of Crooks*, 23 Hun, 696; Sup'm. Ct. 1801, *Forbes v. Frary*, 2 Johns, Cas. 224.

⁶ Sup'm. Ct. 1842, *Ex-Parte Rutter*, 3 Hill, 464.

⁷ Sup'm. Ct. 1869, *White v. Smith*, 1 Lans. 469; Sup'm. Ct. 1886, *Bullock v. Bemis*, 40 Hun, 623; N. Y. Super. Sp. T. 1873, *Hochstetter v. Isaacs*, 14 Abb. N. S. 235 n.

⁸ 1871, *White v. Smith*, 46 N. Y. 418.

begin the trial anew after such reply is served is not error.¹ Where each party has put in all the evidence he desires the report of the referee will not be set aside because formal adjournments were not had from day to day.² He may impose costs as a condition of adjournment,³ but the court cannot, by attachment, compel the payment of such costs;⁴ He may re-open the cause and fix a day for re-argument, even after he has made up his mind.⁵ If the terms imposed as a condition of granting an adjournment are not complied with, the opposing party may proceed with the reference;⁶ it is discretionary with the referee whether he will adjourn the trial on account of the absence of a witness;⁷ his discretion in imposing terms, means terms within his lawful powers. He cannot allow an adjournment on condition that the opposing party have leave to demur.⁸

§ 2. **Procuring and Taking Evidence.**—A witness may be subpoenaed to attend before a referee to testify, and in a proper case, to bring with him a book, document, or other paper, as upon a trial by the court;⁹ the referee has the same power as the court on the trial to compel, by attachment, the attendance of a witness, or to punish him for contempt for non-attendance, or refusal to be sworn, or to testify.¹⁰ The order of proof is in his discretion,¹¹ so is the permission of leading questions;¹² the recalling of a witness

¹ 1871, *White v. Smith*, 46 N. Y. 418.

² N. Y. Super. Sp. T. 1859, *Accessory Transit Co. v. Garrison*, 9 Abb. 141.

³ Sup'm. Ct. 1835, *VanRenselaer v. Fay*, 18 Wend. 509; Sup'm. Ct. 1834, *Sickles v. Fort*, 12 Wend. 199; Sup'm. Ct. Sp. T. 1843, *Butler v. Bates*, 5 Hill, 374; Sup'm Ct. 1826, *Johnson v. Grey*, 6 Cow. 54; Sup'm. Ct. 1845, *Slocum v. Watkins*, 1 Den. 631.

⁴ Sup'm. Ct. Sp. T. 1843, *Butler v. Bates*, 5 Hill, 374; Sup'm. Ct. 1826, *Johnson v. Grey*, 6 Cow. 54.

⁵ Sup'm. Ct. 1862, *Leitch v.*

Brotherson, 16 Abb. 384; Sup'm. Ct, 1858, *Ayrault v. Sackett*, 17 How. 507.

⁶ Sup'm. Ct. Sp. T. 1875, *Gamble v. Taylor*, 43 How. 375.

⁷ N. Y. Super. Chamb. 1848, *Longley v. Hickman*, 3 Super. 681.

⁸ Sup'm. Ct. 1878, *Smith v. Rathbun*, 13 Hun, 47.

⁹ Code Civ. Proc. § 1017.

¹⁰ Code Civ. Proc. § 1018.

¹¹ Com. Pl. 1850, *Gibson v. Pearsall*, 1 E. D. S. 90.

¹² Com. Pl. 1854, *Beach v. Raymond*, 2 E. D. S. 496; Com. Pl. 1858, *Pearson v. Fiske*, 2 Hilt. 146.

after he has been dismissed,¹ the taking or refusing of testimony at any time the cause is before him,² the number of witnesses as to character,³ or striking out evidence admitted without objection ;⁴ but on motion to strike out evidence, the moving party must clearly show such evidence to be incompetent.⁵ When the proof was that the contract was by parol, and on cross-examination it appeared that it was in writing, the refusal of the referee to strike out the parol proof was held error.⁶ The credibility of a witness is solely for the referee,⁷ but he is bound to give credit to unimpeached testimony.⁸ He may strike out the testimony of a witness, who, after notice, refuses to appear for further cross-examination ;⁹ may, on the trial, strike out the testimony taken on commission of a witness whose answer is evasive, irresponsive, or untruthful, or who has not fully and fairly answered the questions ;¹⁰ may strike out testimony received under objection before final submission ;¹¹ may compel a witness to submit to the examination of counsel a memorandum from which he is testifying, under the penalty of having so much of his testimony as rested thereon stricken out.¹² Where a witness refuses to answer on the ground that it would criminate him, the referee should not compel an answer unless he knows that no crime has been committed.¹³ The referee has the same power as the jury as to the comparison of signatures to ascertain

¹ Com. Pl. 1858, *Pearson v. Fiske*, 2 Hilt. 146; Com. Pl. 1855, *Trimble v. Stilwell*, 4 E. D. S. 512.

² N. Y. Super. 1861, *DeLafield v. DeGrauw*, 22 Super. 2; 3 Keyes 467; Sup'm. Ct. 1848, *Schemerhorn v. Devlin*, 1 Code Rep. 28.

³ Sup'm. Ct. 1848, *Green v. Brown*, 3 Barb. 119; 1873, *Armstrong v. Ferguson*, 54 N. Y. 659.

⁴ N. Y. Super. 1866, *Goodrich v. Thompson*, 27 Super. 75.

⁵ N. Y. Super. 1875, *Mercer v. Vose*, 40 Super. 218.

⁶ Ct. App. 1867, *Hatch v. Pryor*, 3 Keyes, 441.

⁷ Sup'm. Ct. 1849, *Leach v. Kelsey*, 7 Barb. 466.

⁸ Sup'm. Ct. 1882, *Matter of Schreyer*, 63 How. 228; 1871, *Elwood v. W. U. T. Co.* 45 N. Y. 549.

⁹ Sup'm. Ct. 1873, *Price v. Wilson*, 67 Barb. 9; See *Matter of Crookes*, 23 Hun, 696.

¹⁰ Sup'm. Ct. 1870, *Terry v. McNeil*, 58 Barb. 241.

¹¹ Sup'm. Ct. 1880, *Marsh v. Kinney*, 11 Week. Dig. 144.

¹² Sup'm. Ct. 1870, *Peck v. Lake*, 3 Lans. 136.

¹³ Sup'm. Ct. 1857, *Fellows v. Wilson*, 31 Barb. 162.

which is genuine.¹ If a party refuses to answer on cross-examination a pertinent question, his evidence in his own favor may be stricken out, or compulsory process may be used to compel an answer.²

§ 3. **Reserving Decision on Objections to Evidence.**—The party objecting to evidence has a right to an immediate ruling thereon; ³ to the refusal of such right an exception will lie to the referee, or to the court appointing him, and a motion may be made to strike out the objectionable testimony; ⁴ but if, by consent of parties, or without objection, decision on the objection is reserved, the objecting party has no remedy.⁵ If the evidence is admissible for any purpose, or against any party, the court is not bound to declare its effect.⁶ The reservation of a decision on the objection is not erroneous if the testimony was relevant, or not calculated to injure the objecting party.⁷ The decision may be reserved until the referee makes his report,⁸ but the practice is objectionable, and should not be followed; ⁹ it is error to receive improper evidence under objection, although the referee in his report states he has disregarded it;¹⁰ so it is to reserve decision until the final submission of the case, then decide as if no objection was made,¹¹ or to receive evidence

¹ N. Y. Super. Trial Term, Hunt v. Lawless, 7 Abb. N. C. 113.

² N. Y. Super. 1860, Bennett v. Phalon, 19 How. 530.

³ Sup'm. Ct. 1875, Lathrop v. Bramhall, 3 Hun, 394; 1885, Matter of Yates, 99 N. Y. 94.

⁴ 1885, Matter of Yates, 99 N. Y. 94.

⁵ Sup'm. Ct. 1875, Clark v. Donaldson, 5 T. & C. 683; 1878, Holden v. N. Y. Bank, 72 N. Y. 286; 1871, Sharp v. Freeman, 45 N. Y. 802.

⁶ Sup'm. Ct. 1875, Lathrop v. Bramhall, 3 Hun, 394; 64 N. Y. 365.

⁷ N. Y. Super. 1876, Mercer v. Vose, 40 Super. 218.

⁸ Sup'm. Ct. 1856, Tremain v. Rider, 13 How. 148.

⁹ Sup'm. Ct. 1874, Berrian v. Sanford, 1 Hun, 625; 1871, Sharpe v. Freeman, 45 N. Y. 802; N. Y. Super. 1878, Clussman v. Merkel, 16 Super. 402; Sup'm. Ct. 1875, Lathrop v. Bramhall, 3 Hun, 394; 5 T. & C. 680; 64 N. Y. 365.

¹⁰ Sup'm. Ct. 1849, Allen v. Way, 7 Barb. 585.

¹¹ Sup'm. Ct. 1866, Peck v. Yorks, 47 Barb. 131; Sup'm. Ct. 1871, Smith v. Kobbe, 59 Barb. 289; N. Y. Super. 1858, Clussman v. Merkel, 16 Super. 402; N. Y. Super. 1856, Brooks v. Christopher, 12 Super. 216; Sup'm. Ct. 1873, Wagener v. Finch, 65 Barb. 493.

apparently, absolutely, really *de bene esse*, and then reject it in making the report.¹ Where the referee, after reserving decision, fails to notify the parties how he has ruled on the evidence, the case may be sent back to the referee, or on appeal, the court may, if the evidence was material, treat it as error.² Testimony so received is to be treated as if received absolutely;³ where so received, the referee should, before closing the case, advise the parties of his ruling on the evidence offered, that an exception may seasonably be taken.⁴ To make the error of the referee in reserving decision available on appeal an exception must be noted, and a specific ruling and exception had thereon when the case is closed;⁵ where incompetent evidence was received without objection through inadvertence, the referee may strike it out on motion of the adverse party.⁶ Where decision is reserved without objection, and the referee is not asked to pass thereon, and no exception is taken thereto, the question cannot be reviewed on appeal.⁷

§ 4. **Power to allow Amendments.**—The referee exercises the same power as the court on the trial of an issue of fact, to allow amendments to the summons, or to the pleadings;⁸ but his power is limited to that exercised by the court on a trial;⁹ he does not possess that of the court at special term.¹⁰ He cannot allow an amendment that will change the cause of action or defense;¹¹ or changing the complaint

¹ Sup'm. Ct. 1850, *Allen v. Way*, 7 Barb. 585; 3 C. R. 243.

² Sup'm. Ct. 1874, *Berrian v. Sanford*, 1 Hun, 625; 1876, *Lathrop v. Bramhall*, 64 N. Y. 365.

³ Sup'm. Ct. 1874, *Kerslake v. Schoonmaker*, 1 Hun, 436; 1876, *Lathrop v. Bramhall*, 64 N. Y. 365.

⁴ Sup'm. Ct. 1873, *Berrian v. Sanford*, 1 Hun, 625.

⁵ N. Y. Super. 1857, *Brooks v. Christopher*, 12 Super. 216.

⁶ 1873, *Armstrong v. Ferguson*, 54 N. Y. 659.

⁷ 1885, *Matter of Yates*, 99 N. Y. 94.

⁸ Code Civ. Proc. §1018.

⁹ Ct. App. 1867, *Melvin v. Wood*, 3 Keyes, 533; 1879, *Quimby v. Claffin*, 77 N. Y. 270; Sup'm. Ct. 1860, *Van Ness v. Bush*, 22 How. 481; Sup'm. Ct. Sp. T. 1873, *Chittenango Co. v. Stewart*, 67 Barb. 423.

¹⁰ Sup'm. Ct. 1873, *Chittenango Co. v. Stewart*, 67 Barb. 423; Sup'm. Ct. Sp. T. 1868, *Ford v. Ford*, 53 Barb. 525.

¹¹ Sup'm. Ct. 1860, *Woodruff v. Hurson*, 32 Barb. 557; Sup'm. Ct. Sp. T. 1860, *Union Bank v. Mott*, 18 How. 506; Sup'm. Ct. Sp. T. 1851,

from one to rescind a contract and restore the parties to their previous condition, to one for damages for fraud;¹ or to change the complaint from one for use and occupation to one for money had and received;² or to change it from one on an account stated to one for damages for breach of contract;³ or change the action from one in equity to ejectment;⁴ nor can he allow an amendment setting up a new cause of action or defense;⁵ nor one setting up the statute of limitations.⁶ After permitting an amendment he has no power to allow a demurrer,⁷ or a supplemental pleading.⁸ He may permit the pleadings to be amended to conform to the proof where it does not substantially change the character of the action or defense;⁹ may disregard an immaterial variance between pleading and proof;¹⁰ but the better rule is that the referee should disregard an immaterial variance and leave the court to determine whether the pleadings should be amended to conform to the proof.¹¹ It has been said in many cases that the only

Holmes v. Slocum, 6 How. 217; *Sup'm. Ct.* 1878, *Smith v. Rathbun*, 13 Hun, 47.

¹ *Sup'm. Ct.* 1874, *Sinclair v. Neil*, 1 Hun, 80.

² *Sup'm. Ct.* 1876, *Joslyn v. Joslyn*, 9 Hun, 388.

³ *Sup'm. Ct.* 1878, *Wiley v. Brigham*, 16 Hun, 106.

⁴ 1878, *Boeckes v. Lansing*, 74 N. Y. 437.

⁵ 1871, *Bennett v. Lake*, 47 N. Y. 93; *Sup'm. Ct.* 1873, *Livermore v. Bainbridge*, 14 Abb. N. S. 227 n; N. Y. Super. 1873, *Hochstetter v. Isaacs*, 14 Abb. N. S. 235; 1885, *Price v. Brown*, 98 N. Y. 388; *Sup'm. Ct. Sp. T.* 1860, *Union Bank v. Mott*, 18 How. 506; 10 Abb. 378; N. Y. Super. 1874, *Dougherty v. Vallotton*, 38 Super. 455; *Sup'm. Ct.* 1860, *Woodruff v. Hurson*, 32 Barb. 557; *Sup'm. Ct. Sp. T.* 1868, *Ford v. Ford*, 35 How. 321; 53 Barb. 525; *Sup'm. Ct.* 1864, *Dunnigan v.*

Crummey, 44 Barb. 528; *Sup'm. Ct.* 1859, *Johnson v. McIntosh*, 31 Barb. 267; N. Y. Super. 1876, *Woodruff v. Dickie*, 28 Super. 619.

⁶ *Sup'm. Ct.* 1879, *Riley v. Corwin*, 17 Hun, 597.

⁷ *Sup'm. Ct.* 1878, *Smith v. Rathbun*, 13 Hun, 47.

⁸ N. Y. Super. 1871, *Lyon v. Scott*, 34 Super. 41.

⁹ 1879, *Chapin v. Dobson*, 78 N. Y. 74; 1871, *Bennett v. Lake*, 47 N. Y. 93; N. Y. Super. 1871, *Coates v. Donnell*, 48 Super. 46.

¹⁰ *Sup'm. Ct.* 1865, *Dunnigan v. Crummey*, 44 Barb. 528; N. Y. Super. 1859, *Hart v. Hudson*, 13 Super. 294; N. Y. Super. 1857, *Rogers v. Verona*, 14 Super. 417; N. Y. Super. 1854, *Cobb v. West*, 11 Super. 38; N. Y. Super. 1849, *Hawkins v. Appleby*, 4 Super. 421; Com. Pl. 1854, *Parsons v. Suydam*, 3 E. D. S. 276.

¹¹ N. Y. Super. 1857, *Hart v. Hudson*, 13 Super. 294.

power the referee has is to allow amendments only to cure an immaterial variance;¹ he cannot entertain a motion to strike out part of an answer.² A motion to amend in a case within the referee's power to grant is discretionary, from the decision of which no appeal will lie.³ It is also discretionary whether he will allow an amendment setting up a technical and dilatory defense;⁴ or whether he will, on terms, allow an amendment inserting material allegations.⁵ Where an order is made by him allowing an amendment it must be accepted as a whole, the adverse party cannot accept a part and reject a part.⁶ An amended answer to an amended complaint is not a matter of right where no surprise is shown, and it is not pretended that the facts are materially changed.⁷ An amendment alleging that an assignment stated to be in writing was by parol and given as security may be allowed;⁸ so may one inserting the word "knowledge" before the word "information" in an answer containing a denial;⁹ so may one that will change the name, but not the character of the action made in the complaint, as when the complaint alleged that defendant, as plaintiff's agent, made an agreement with the United States to carry the mails between two stations for a sum named, of which he was to receive a fixed amount, that he had collected the whole amount, but had failed to pay over a certain sum, it was held the referee had authority to allow an amendment alleging that defendant made the con-

¹ Sup'm. Ct. 1880, *Sinclair v. Neill*, 1 Hun, 80; Sup'm. Ct. 1868, *Ford v. Ford*, 53 Barb. 525; 35 How. 321; Sup'm. Ct. Chamb. 1860, *Union Bank v. Mott*, 10 Abb. 372; 18 How. 506; Sup'm. Ct. 1864, *Dunnigan v. Crummey*, 44 Barb. 528; Sup'm. Ct. 1878, *Smith v. Rathbun*, 13 Hun, 47.

² 1864, *Smith v. Countryman*, 30 N. Y. 655.

³ Sup'm. Ct. 1860, *Woodruff v. Hurson*, 32 Barb. 557; N. Y. Super. 1862, *Secor v. Law*, 22 Super. 163; Sup'm. Ct. 1878, *Smith v. Rathbun*.

13 Hun, 47; Sup'm. Ct. 1861, *Thomasson v. Peterson*, 22 How. 98.

⁴ Sup'm. Ct. 1872, *Brett v. First Soc.* 63 Barb. 610.

⁵ 1878, *Smith v. Rathbun*, 75 N. Y. 122.

⁶ 1878, *Smith v. Rathbun*, 75 N. Y. 122.

⁷ Sup'm. Ct. 1865, *Dunnigan v. Crummey*, 44 Barb. 528.

⁸ N. Y. Super. 1861, *Hoyt v. Hoyt*, 21 Super. 511.

⁹ 1871, *Bennett v. Lake*, 47 N. Y. 93.

tract for himself and employed plaintiff to do the work for a certain per cent. of the contract price.¹ An amendment of the pleading to correspond with the proof should be spread upon the record.² An objection to the amendment of the complaint is waived by the service of an amended answer.³ An amendment setting up that one of the defendants sued as a partner was not a partner, and that the claim sued on had been paid in part, may be allowed.⁴ Where in an insurance case the complaint alleges that proper proofs had been furnished, the referee may allow an amendment alleging a waiver of proof.⁵ Where costs are imposed as a condition of granting an amendment acceptance of costs is a waiver of objection to its allowance.⁶ Where the evidence plainly shows an accord and satisfaction the answer should be amended to include it.⁷ The verification may be amended before the referee;⁸ or a new bill of particulars substituted in place of one already served.⁹ The trial may be suspended to allow an application to the court for leave to amend.¹⁰ The power of the referee to allow an amendment adding or striking out the name of a party refers only to parties omitted or added by mistake or otherwise.¹¹ He cannot allow an amendment bringing in a party by compulsory process.¹² He may, under objection, reserve his decision on a motion to amend until the close of the trial;¹³ when decision is so reserved without objection allowance of the amendment in the findings is sufficient.¹⁴ The propriety of allowing an amend-

¹ Sup'm. Ct. 1882, *Oregon Co. v. Otis*, 27 Hun, 452.

² Sup'm. Ct. 1877, *Ballou v. Parsons*, 11 Hun, 602.

³ N. Y. Super. 1862, *Secor v. Law*, 22 Super. 163.

⁴ Sup'm. Ct. 1884, *Frazer v. Hurst*, 18 Week. Dig. 390.

⁵ 1880, *Grattan v. Met. L. T. Co.* 80 N. Y. 281.

⁶ 1880, *Grattan v. Met. L. T. Co.* 80 N. Y. 281.

⁷ Sup'm. Ct. 1872, *Brett v. First Soc.* 63 Barb. 610.

⁸ 1871, *Bennett v. Baker*, 47 N. Y. 93.

⁹ Ct. App. 1867, *Melvin v. Wood*, 4 Abb. N. S. 438.

¹⁰ Sup'm. Ct. 1878, *Newman v. Marvin*, 12 Hun, 236; Sup'm. Ct. 1886, *Bullock v. Bemis*, 40 Hun, 623.

¹¹ Sup'm. Ct. 1878, *Newman v. Marvin*, 12 Hun, 236.

¹² Sup'm. Ct. 1878, *Newman v. Marvin*, 12 Hun, 236.

¹³ 1879, *Chapin v. Dobson*, 78 N. Y. 74.

¹⁴ N. Y. Super. 1880, *Bean v. Edge*, 46 Super. 455.

ment on the trial can be reviewed only on appeal from the judgment;¹ the special term has no authority to interfere.² A different rule has been laid down in some of the cases;³ but in *Hochstetter v. Isaacs*, 14 Abb. N. S. 235, Freedman, J., stated the true rule to be that where the allowance or disallowance of the proposed amendment is in the discretion of the referee the exercise of that discretion is not reviewable by the court on motion; the power of a referee to allow an amendment within the scope of his authority is not exclusive of, but concurrent with that of the court.⁴

§ 5. **Power to Punish for Contempt.**—The referee may punish a witness as for contempt for non-attendance or refusal to be sworn or to testify,⁵ but he can exercise this power only in cases where the referee is to hear and determine;⁶ in references other than for the trial of issues, it seems the facts should be reported to the court.⁷ It has been held that the authority to punish for disorderly and contemptuous conduct pertains solely and exclusively to the court in which it occurs in its immediate view and presence. Such power cannot be delegated by the referee to a judge,⁸ but the better rule is that the court at special term has inherent concurrent power with the referee to punish for contempt.⁹ As a basis for a motion to the court to punish, the referee should adjudge the party guilty.¹⁰ Where the contempt before

¹ N. Y. Super. 1876, *McPherson v. Romer*, 40 Super. 448; N. Y. Super. 1866, *Woodruff v. Dickie*, 28 Super. 619.

² Sup'm. Ct. 1882, *Knapp v. Fowler*, 26 Hun, 200.

³ Sup'm. Ct. 1868, *Ford v. Ford*, 53 Barb. 525; Sup'm. Sp. T. 1860, *Union Bank v. Mott*, 18 How. 506; Sup'm. Ct. Sp. T. 1858, *Billings v. Baker*, 6 Abb. 213.

⁴ N. Y. Super. Sp. T. 1873, *Hochstetter v. Isaacs*, 14 Abb. N. S. 235; Sup'm. Ct. 1878, *Wiley v. Brigham*, 16 Hun, 106; Sup'm. Ct. 1886, *Bullock v. Bemis*, 40 Hun, 623.

⁵ Code Civ. Proc. § 1018.

⁶ N. Y. Super. 1860, *Burnett v. Phalon*, 11 Abb. 157.

⁷ Sup'm. Ct. 1881, *Matter of Crooks*, 23 Hun, 696.

⁸ N. Y. Super. 1864, *Heerdt v. Wetmore*, 25 Super. 697.

⁹ N. Y. Super. Chamb. 1860, *Byass v. Smith*, 17 Super. 679; N. Y. Super. 1860, *Burnett v. Phalon*, 11 Abb. 157; Sup'm. Ct. 1858, *Sully v. Jobson*, 6 Abb. 217 n; Compare *Heerdt v. Wetmore* above.

¹⁰ N. Y. Super. 1864, *Heerdt v. Wetmore*, 25 Super. 697.

¹¹ Ct. App. 1869, *Sudlow v. Knox*, 7 Abb. N. S. 411.

the referee is shown, the facts may be certified to the court for action.¹ On proceedings to punish, a reference may be ordered to take testimony without filing interrogatories;² It is not contempt to refuse to leave books with the referee when the order only requires the party to produce them. Whether the referee could compel him to leave the books was not decided.³ A party is entitled to reasonable time to obey an order before he can be punished for refusal.⁴ Before an attachment can issue against a party for failure to comply with a judgment, a reference may be had to ascertain precisely what the party is required to do.⁵ On a motion to punish a party for violating an injunction, the referee should take proof and determine the loss caused by such violation.⁶ Where the contempt consists in refusal to answer a question the referee should pass upon and require the question to be answered before an attachment is moved for.⁷ When application is made to the court for attachment, or for an order to show cause why one should not issue against a party disobeying an order made by a referee, it is based upon a special report by the referee, or upon affidavit.⁸ The attachment will issue when the affidavits in relation to the alleged contempt are conflicting, to enable the complainant to compel the attendance of witnesses to prove the facts,⁹ but the order should not adjudge that defendant is guilty of contempt; it should merely direct the issuing of the attachment, or only declare that there appears to be probable cause for the issue thereof;¹⁰ an or-

¹ Ct. App. 1869, *Sudlow v. Knox*, 7 Abb. N. S. 411.

² Sup'm. Ct. 1874, *People v. Alexander*, 3 Hun, 211; 5 T. & C. 297; 1867, *Pitt v. Davidson*, 37 N. Y. 235.

³ Ct. App. 1869, *Sudlow v. Knox*, 7 Abb. N. S. 411.

⁴ N. Y. Super. 1864, *Heerdt v. Wetmore*, 25 Super. 697.

⁵ Sup'm. Ct. 1876, *Sutton v. Davis*, 6 Hun, 237; Sup'm. Ct. 1874, *People v. Alexander*, 3 Hun, 211; 5 T. &

C. 297; 1867, *Pitt v. Davidson*, 37 N. Y. 235.

⁶ Sup'm. Ct. 1874, *Hartau v. Deer Park Co.* 1 Hun, 493.

⁷ Chancery, 1841, *Forbes v. Meeker*, 3 Edw. Ch. 452.

⁸ N. Y. Super. 1851, *Fraser v. Phelps*, 6 Super. 682; N. Y. Super. 1850, *Matter of Smethurst*, 4 Super. 724.

⁹ Chancery, 1834, *McCredie v. Senior*, 4 Paige, 378.

¹⁰ Chancery, 1834, *McCredie v. Senior*, 4 Paige, 378.

der to show cause instead of an attachment may be issued.¹

§ 6. **Motion to Dismiss.**—The referee may dismiss the complaint for an entire failure of proof.² Such dismissal may be on the merits when an important point submitted by consent is decided against the plaintiff, and the latter fails to proceed with the trial after due notice.³ To make the motion to dismiss equivalent to a non-suit, a distinct ruling must be had thereon at the time, or as of the time the motion was made, and before the final submission of the whole case, and for the purpose of review, an exception taken thereto.⁴ Where, at the close of the evidence, a motion is made to dismiss, and no disposition made thereof, and subsequently the referee makes a report in ordinary form dismissing the complaint, it is not a non-suit, but a disposition on the merits.⁵ When the complaint is dismissed on plaintiff's failure to appear, judgment absolute should not be rendered against him.⁶ Where a motion for a non-suit is made, an immediate decision may be required, and to a refusal so to decide, an exception will lie. The proceedings on the motion may be made part of the case and reviewed on appeal, if a proper exception has been taken.⁷

§ 7. **Requests to Find.**—Before the cause is finally submitted, or within such time thereafter as the referee may allow; either party may submit in writing a statement of the facts which he deems established by the evidence, and of the rulings on questions of law which he desires the referee to make; the statement must be in the form of distinct propositions of fact, or law, or both separately stated, numbered, and so written and arranged that the referee can conveniently pass upon it. At or before the time when the

¹ Chancery, 1842, *Albany Bank v. Schermerhorn*, 9 Paige, 372; Code Civ. Proc. § 2269.

² N. Y. Super. 1875, *Dougherty v. Valloton*, 38 Super. 455; Code Civ. Proc. § 1018; Rule 30.

³ Sup'm. Ct. 1878, *Wilkins v. Buck*, 13 Hun, 124.

⁴ 1877, *Van Derlip v. Keyser*, 68 N. Y. 443.

⁵ 1877, *Van Derlip v. Keyser*, 68 N. Y. 443.

⁶ N. Y. Super. 1852, *Salter v. Malcolm*, 8 Super. 596.

⁷ 1877, *Van Derlip v. Keyser*, 68 N. Y. 443; Sup'm. Ct. 1886, *Pritchard v. Hirt*, 39 Hun, 378.

decision or report is rendered, the referee must note in the margin his action on each proposition thereof, and file, or return to the attorney the statement so noted.¹ To raise a question of law on facts not found, there must be a request and a refusal to find;² without these the facts can not be reviewed on appeal.³ The request must be made before the delivery of the report; one made thereafter on the settlement of the case is unavailable;⁴ must be in the form of distinct propositions of fact, not evidence of facts,⁵ and must point out the precise finding desired.⁶ Where it contains more than one proposition, it may be denied if either be erroneous.⁷ A request to find that defendant is entitled to a report in his favor, is of no avail;⁸ nor is a request to find a fact as to which no evidence was offered.⁹ A party cannot compel the referee to accept such findings and conclusions as he may frame and allow exceptions to such findings and conclusions.¹⁰ Where requests were made and submitted to, but mislaid by the referee until after the making and delivery of the report, and were then passed upon, it was held they were properly inserted in the case on appeal.¹¹ Where evidence, though incompetent, is admitted, whether with or without objection, a party may insist on the facts shown thereby.¹² "Not found" and "not found as stated," are sufficient as refusals to find.¹³ A refusal to make a find-

¹ Code Civ. Proc. § 1023.

² N. Y. Super. 1875, *Kemple v. Darrow*, 39 Super, 447; 1873, *Meacham v. Darrow*, 54 N. Y. 217; Sup'm. Ct. 1884, *Drury v. Wigg*, 19 Week. Dig. 417; Com. Pl. 1886, *Loonam v. Meyers*, 1 N. Y. St. Rep. 276.

³ Sup'm. Ct. 1861, *Murray v. Barney*, 34 Barb. 336.

⁴ 1881, *Gormerly v. McGlynn*, 84 N. Y. 284; Sup'm. Ct. 1874, *Excelsior Co. v. Lacy*, 3 Hun, 111; Sup'm. Ct. 1885, *Forsythe v. Rickenbrode*, 22 Week. Dig. 470; Sup'm. Ct. Sp. T. 1879, *Morgan v. Bosworth*, 1 Law. Bul. 35.

⁵ Sup'm. Ct. 1887, *Friedman v. Bierman*, 43 Hun, 387.

⁶ 1860, *Grant v. Morse*, 22 N. Y. 323.

⁷ 1881, *Davis v. Leopold*, 87 N. Y. 620.

⁸ 1871, *Redmond v. Liverpool Co.* 46 N. Y. 578.

⁹ N. Y. Super. 1877, *Wilson v. Knapp*, 42 Super. 25.

¹⁰ 1872, *Lefler v. Field*, 47 N. Y. 407.

¹¹ Sup'm. Ct. 1887, *Friedman v. Bierman*, 43 Hun, 387.

¹² 1868, *Flora v. Carbrau*, 38 N. Y. 111.

¹³ 1881, *Davis v. Leopold*, 87 N. Y. 620.

ing when requested raises a question of law,¹ which is available on appeal if the fact was conclusively proven.² No exception lies to a failure to find where no request therefor was made,³ otherwise if there was evidence to the contrary.⁴ A party is bound by a finding made at his request.⁵ Since the adoption of section 1023 of the Code of Civil Procedure and the amendment of Rule 32, the report of the referee cannot be sent back for further findings of fact and conclusions of law. The former practice in this respect is abrogated thereby.⁶

§ 8. **Jurisdiction over Costs.**—The referee has jurisdiction to award costs,⁷ but only where all the issues are referred.⁸ They are in his discretion, where all the issues are referred in actions in equity;⁹ including actions for foreclosure,¹⁰ and actions to redeem personal property;¹¹ but when he was by the terms of the order to hear and determine the issues and report to the court the allowances for costs, the report as to costs is a recommendation only.¹² He has jurisdiction over costs when he has to determine whether the action could have been brought in a justice's court,¹³ but he has none where the action could have been so brought,¹⁴

¹ Code Civ. Proc. 993; 1881, Gormerly *v. McGlynn*, 84 N. Y. 284; 1880, *James v. Cowing*, 82 N. Y. 449.

² 1875, *Smith v. Glens Falls Co.*, 62 N. Y. 85.

³ 1864, *Ashley v. Marshall*, 29 N. Y. 494.

⁴ 1874, *Andrews v. Raymond*, 58 N. Y. 676.

⁵ 1874, *East River Co. v. Gove*, 57 N. Y. 597.

⁶ 1880, *James v. Cowing*, 82 N. Y. 449; 1881, Gormerly *v. McGlynn*, 84 N. Y. 284; Sup'm. Ct. 1885, *Gardiner v. Schwab*, 34 Hun, 582.

⁷ Code Civ. Proc. §1018.

⁸ Ct. App. 1867, *Barker v. White* 3 Keyes, 617; 5 Abb. N. S. 124; Sup'm. Ct. 1851, *Luddington v. Taft*,

10 Barb. 147; Sup'm. Ct. Sp. T. 1850, *Graves v. Blanchard*, 4 How. 300; Com. Pl. Sp. T. 1878, *Morgan v. Stevens*, 6 Abb. N. C. 356.

⁹ Ct. App. 1867, *Barker v. White*, 3 Keyes, 617; 5 Abb. N. S. 356; Sup'm. Ct. Sp. T. 1856, *Mesereau v. Ryerss*, 12 How. 300; Sup'm. Ct. 1850, *Graves v. Blanchard*, 4 How. 300; Sup'm. Ct. 1851, *Luddington v. Taft*, 10 Barb. 447.

¹⁰ Sup'm. Ct. 1870, *Stevens v. Verriane*, 2 Lans. 90.

¹¹ Sup'm. Ct. 1859, *Pratt v. Stiles*, 17 How. 211.

¹² Sup'm. Ct. S. T. 1883, *Pierson v. Drexel*, 11 Abb. N. C. 150.

¹³ Sup'm. Ct. 1859, *Gilliland v. Campbell*, 18 Hun, 177.

¹⁴ Sup'm. Ct. 1883, *Burdick v.*

nor has he authority to award them against an executor or administrator personally,¹ nor when the right thereto depends on facts not proven on the trial.²

Hale, 13 Abb. N. C. 60; 1871, Fuller *v.* Couch, 47 N. Y. 89.

¹Sup'm. Ct. 1875, Bailey *v.* Bergen, 5 Hun, 555.

²Sup'm. Ct. 1859, Gilliland *v.*

Campbell, 18 How. 177; Sup'm. Ct. Sp. T. Mesereau *v.* Ryerss, 12 How.

300; Sup'm. Ct. 1865, Tilman *v.* Keane, 1 Abb. N. S. 23.

CHAPTER VIII.

PROCEEDINGS SUBSEQUENT TO TRIAL.

- SECTION 1.—Report, form and contents.
 SECTION 2.—Delivering or filing report.
 SECTION 3.—Fees of referee.
 SECTION 4.—When power of referee ceases.
 SECTION 5.—Setting aside report on motion.
 SECTION 6.—Costs and adjustment.
 SECTION 7.—Entering judgment.
 SECTION 8.—Excepting to the report.
 SECTION 9.—Making and settling case.
 SECTION 10.—Making and settling bill of exceptions.

§ 1, **Report, Form and Contents.**—The report should contain the title of the action, should be addressed to the court, should recite the substance, but not a copy of the order and state the appearances.¹ If the action is in equity and an account has been taken, the report may consist of two parts, the body and the schedules, the body containing the facts and conclusions, and referring to the schedules for more detailed information.² It must state separately the facts found and the conclusions of law, and direct the judgment to be entered thereon. If costs are discretionary must award, or deny costs; if costs are awarded the report must state to whom.³ Where more than one referee has been appointed, all must meet to prepare it;⁴ if no two agree, one subsequently signed by two separately, or on conference without the presence of, or notice to the third is irregular;⁵

¹ 1 Barb. Ch. Pr. (548.)

Sup'm. Ct. Sp. T. 1845, *Clark v. Frisbie*, 1 How. 98.

² 1 Barb. Ch. Pr. (548.)

³ Code Civ. Proc. §. 1022.

⁵ N. Y. Super. 1871, *Townsend v.*

⁴ N. Y. Super. 1871, *Townsend v. Glens Falls Co.* 33 Super. 130; 10 Glens Falls Co. 33 Super. 130; Abb. N. S. 277.

a report properly made is sufficient if signed by a majority.¹ The cause is within the power of the referee until the report is delivered or filed ; until then he may change his opinion or re-open the case for further evidence.² It must conform to the order of reference.³ The right to separate findings of fact and conclusions of law is a substantial one,⁴ but may be waived.⁵ If not waived the report and judgment entered thereon may be set aside for irregularity.⁶ It must rest on facts warranting the findings distinctly stated ;⁷ the findings should be of facts, not evidence of facts ;⁸ the particulars that go to make up the general conclusions are unnecessary ;⁹ but when the action involves various dealings between the parties, the report must contain a sufficient statement of the accounts to enable the court to determine the correctness thereof.¹⁰ Only such facts as enter into and form the basis of the decision are required ; it is not necessary to negative in express terms any others.¹¹ When the report is in favor of the plaintiff, a finding on the facts

¹ Code Civ. Proc. § 1026.

² Sup'm. Ct. Cir. 1858, *Ayrault v. Sackett*, 17 How. 461 ; Sup'm. Ct. Sp. T. 1860, *Kissam v. Hamilton*, 20 How. 369 ; Com. Pl. 1854, *Duguid v. Ogilvie*, 3 E. D. S. 527.

³ Sup'm. Ct. Sp. T. 1860, *Taaks v. Schmidt*, 19 How. 413.

⁴ Sup'm. Ct. 1875, *Gove v. Hammond*, 48 How. 385 ; 1871, *Van Slyck v. Hyatt*, 46 N. Y. 259 ; N. Y. Super. 1852, *Church v. Erben*, 6 Super. 691 ; Sup'm. Ct. 1869, *Manley v. Ins. Co. 1 Lans. 20* ; 1856, *Johnson v. Whitlock*, 13 N. Y. 344 ; Sup'm. Ct. 1881, *Ricketts v. Wessels*, 12 Week. Dig. 379.

⁵ 1864, *Smith v. Coe*, 29 N. Y. 666.

⁶ Sup'm. Ct. Sp. T. 1865, *Wright v. Sanders*, 28 How. 395.

⁷ Sup'm. Ct. 1874, *Spooner v. Lefevre*, 2 T. & C. 666 ; Sup'm. Ct. 1869, *Armstrong v. Bicknell*, 2 Lans. 216 ; 1861, *Smith v. Devlin*, 23 N.

Y. 363 ; Sup'm. Ct. 1861, *Buckingham v. Payne*, 36 Barb. 81.

⁸ Sup'm. Ct. 1861, *Buckingham v. Payne*, 36 Barb. 81 ; Ct. App. 1867, *Wiltzie v. Eadie*, 4 Abb. N. S. 393 ; 1875, *Quincy v. White*, 63 N. Y. 370 ; N. Y. Super. Sp. T. 1860, *Lane v. Borst*, 28 Super. 609 ; 1855, *Griscone v. Mayor*, 12 N. Y. 586 ; Sup'm. Ct. 1873, *Jarvis v. Jarvis*, 66 Barb. 381 ; Sup'm. Ct. 1875, *Avery v. Foley*, 4 Hun, 415 ; Sup'm. Ct. 1879, *Dorlon v. Merritt*, 18 Hun, 27 ; 1877, *Potter v. Carpenter*, 71 N. Y. 74 ; 1882, *Davis v. Leopold*, 87 N. Y. 620.

⁹ N. Y. Super. 1877, *Wilson v. Knapp*, 42 Super. 75 ; Sup'm. Ct. 1875, *Avery v. Foley*, 4 Hun, 415 ; Sup'm. Ct. 1879, *Dolan v. Burnett*, 18 Hun, 27 ; 1860, *Grant v. Morse*, 22 N. Y. 323.

¹⁰ 1880, *Biglie v. Pinkney*, 80 N. Y. 636 ; Sup'm. Ct. 1874, *Spooner v. Lefevre*, 2 T. & C. 666.

¹¹ Sup'm. Ct. 1875, *Gove v. Ham-*

of the defense or counterclaim is not required.¹ The findings must be within the issues, and cover all material facts in issue,² but only issues admitted, or as to which evidence was given;³ they must be sufficiently full to justify the conclusions of law,⁴ and as explicit and distinct as the special verdict of a jury.⁵ Neither evidence, argument nor comment has any legitimate place in the findings of fact or conclusions of law.⁶ An opinion of the referee referring argumentatively and in a general way to the facts and conclusions arrived at by him is not such a report as the law contemplates;⁷ one that wholly ignores the principal issue in the action cannot be sustained;⁸ evidence of a witness who died during an adjournment had by consent after the direct examination was finished, cannot be disregarded or rejected.⁹ The report must be based on the evidence, not upon the referee's inspection and view of the premises in question.¹⁰ It is error to deliver duplicates, one to each party, but the judgment entered thereon will not be set aside therefor.¹¹ When the referee delivered two reports, one general, stating a specific sum due, and the other specific, containing findings of fact and conclusions of law, the amount found due being the same in each, the general report was disregarded.¹² Where increased damages are given

mond, 48 How. 385; 1873, *Quincy v. Young*, 53 N. Y. 504; Sup'm. Ct. 1864, *Nelson v. Ingersoll*, 27 How. 1; N. Y. Super. 1870, *Andrew v. Whitlock*, 32 Super. 623; 1875, *Quincy v. White*, 63 N. Y. 370; 1881, *Stevens v. Mayor*, 84 N. Y. 296.

¹ Sup'm. Ct. 1864, *Nelson v. Ingersoll*, 27 How. 1; Sup'm. Ct. 1854, *Patterson v. Graves*, 11 How. 91; Sup'm. Ct. 1867, *Sermont v. Baetjer*, 49 Barb. 362.

² N. Y. Super. 1861, *Sackett v. N. Y. Co.* 21 Super. 228; Ct. App. 1867, *Wiltzie v. Eadie*, 4 Abb. N. S. 393; Sup'm. Ct. Sp. T. 1852, *Van Steenburgh v. Hoffman*, 6 How. 492.

³ Sup'm. Ct. 1854, *Patterson v. Graves*, 11 How. 91; Sup'm. Ct.

1855. *Ingraham v. Gilbert*, 20 Barb. 151.

⁴ 1878, *Field v. Field*, 73 N. Y. 588.

⁵ Sup'm. Ct. 1861, *Buckingham v. Payne*, 36 Barb. 81.

⁶ 1876, *Glaucius v. Black*, 50 N. Y. 145.

⁷ Ct. App. 1856, *Mills v. Thursby*, 12 How. 417.

⁸ Sup'm. Ct. 1869, *Collins v. Clark*, 54 Barb. 184.

⁹ Ct. of Err. 1844, *Forrest v. Kissam*, 7 Hill, 468.

¹⁰ 1878, *Clafline v. Meyer*, 75 N. Y. 260.

¹¹ N. Y. Super. Sp. T. 1867, *Currie v. Cowles*, 30 Super. 3.

¹² N. Y. Super. 1864, *Niles v. Battershall*, 25 Super. 146; 18 Abb. 161; 27 How. 381.

by statute, the referee must specify the amount for single and direct judgment for the increased damages.¹ The referee must draw the inferences warranted by the evidence, and say, in explicit language, what it requires and implies as matter of fact.² In finding performance of a contract, it is not necessary to find how it was performed.³ A general finding is controlled by a special finding of fact;⁴ a finding of fact contrary to admissions in the pleadings is erroneous, though sustained by the evidence;⁵ a finding that a corporation duly accepted a bill of exchange is a finding that its officers were duly authorized to accept the same.⁶ A report that the evidence leaves the mind in doubt, therefore the complaint is dismissed, is insufficient.⁷ A finding that the assignor had no actual design to defraud, but intended to apply his property to the payment of his debts, is equivalent to a finding that an assignment was made in good faith;⁸ one that plaintiff has failed to prove facts to sustain his complaint, is a conclusion that the complaint should be dismissed;⁹ one that defendant's servant drove his master's wagon violently, negligently, carelessly, and with great force and violence against plaintiff's carriage imports simply negligence, not wilful injury;¹⁰ where the parties stipulate in open court that the referee need not find facts, but might state generally his conclusions, and the referee reports that plaintiff ought not to maintain his action, it will be presumed he has found for defendant on all the issues;¹¹ when a finding that defendant was guilty of negligence is not necessary, it is sufficient if it appear as a conclusion of law.¹² To sustain a finding of fact there must be enough

¹ Code Civ. Proc. § 1020.

² Sup'm. Ct. 1867, *Voorhies v. Voorhies*, 50 Barb. 119.

³ Sup'm. Ct. 1867, *Sermont v. Baetjer*, 49 Barb. 362.

⁴ 1882, *Phelps v. Vischer*, 50 N. Y. 69; 1879, *Bennett v. Berdan*, 76 N. Y. 386.

⁵ Sup'm. Ct. 1877, *Ballou v. Parsons*, 11 Hun, 602.

⁶ N. Y. Super. 1859, *Farmers' Bank v. Empire Co.* 10 Abb. 47.

⁷ Sup'm. Ct. 1876, *Bradley v. McLaughlin*, 8 Hun, 545.

⁸ 1868, *Casey v. James*, 37 N. Y. 608.

⁹ Sup'm. Ct. 1875, *Gove v. Hammond*, 48 How. 385.

¹⁰ 1874, *Metcalf v. Baker*, 57 N. Y. 662.

¹¹ Sup'm. Ct. 1873, *Smith v. Rowley*, 66 Barb. 503.

¹² 1876, *Sherman v. Hudson River Co.* 64 N. Y. 254.

evidence to carry the case to the jury;¹ the testimony of a single witness, though contradicted by that of four others, will be sufficient,² but the referee has no right to disregard the evidence of both parties, and make an independent finding.³ While he has a right to find a witness mistaken, he cannot deem the testimony of an uncontradicted witness false and perjured, and infer the truth to be contrary to what the witness has stated.⁴ A finding in express terms of a conclusion of law is not in all cases essential, where it results necessarily from the facts found.⁵ A finding of fact justified by the evidence, will be assumed in support of a conclusion of law,⁶ unless injustice would be done thereby;⁷ one authorized by the evidence will be assumed in aid of a general finding,⁸ unless a request therefor was refused.⁹ The code has made no distinction between the reports on the trial of the issues at law, or in equity.¹⁰ Where a complete determination of the rights of the parties requires an account to be taken, the referee may proceed and take the account, or he may order an interlocutory decree to be entered, declaring the rights of the parties and directing an account to be taken, or such other proceedings had as the case requires;¹¹ the former is the better practice as affording opportunity for a speedy review of the report on the issues, but is not a matter of right.¹² The report in such

¹ 1870, *Putnam v. Hubbell*, 42 N. Y. 106.

² Sup'm. Ct. 1866, *Wright v. Saunders*, 65 Barb. 214.

³ N. Y. Super. 1865, *Heim v. Link*, 52 Super. 547.

⁴ 1871, *Fordham v. Smith*, 46 N. Y. 683.

⁵ 1876, *Cagger v. Lansing*, 64 N. Y. 417.

⁶ 1881, *Parker v. Baxter*, 86 N. Y. 586; 1864, *Ashley v. Marshall*, 29 N. Y. 494.

⁷ N. Y. Super. 1861, *Heroy v. Kerr*, 21 Super. 194.

⁸ Sup'm. Ct. 1863, *Union Bank v. Mott*, 39 Barb. 180; 1871, *Oberlander v. Spiess*, 45 N. Y. 175.

⁹ 1871, *Meyer v. Amidon*, 45 N. Y. 169.

¹⁰ Code Civ. Proc. § 1022; Sup'm. Ct. 1856, *Palmer v. Palmer*, 13 How. 363.

¹¹ Sup'm. Ct. 1874, *Mundorf v. Mundorf*, 1 Hun, 41; Sup'm. Ct. 1856, *Palmer v. Palmer*, 13 How. 363; N. Y. Super. 1869, *Trufant v. Merrill*, 37 How. 531; N. Y. Super. Sp. T. 1879, *Hathaway v. Russell*, 45 Super. 538.

¹² N. Y. Super. Sp. T. 1879, *Hathaway v. Russell*, 45 Super. 538; Sup'm. Ct. 1856, *Palmer v. Palmer*, 13 How. 363; Sup'm. Ct. Sp. T. 1853, *Bantes v. Brady*, 8 How. 216; Sup'm. Ct. 1846, *Central T. Co. v. N. Y. & N. Co.* 42 Hun, 602;

case should declare the rights of the parties, the manner of enforcing them, and if it directs an account, should state how the account should be taken.¹ If an account is directed the manner of taking should be stated,² although merely directing, an account will be sufficient. In such case it will be presumed it is to be taken in accordance with the old chancery rules.³ The referee must award ordinary costs, and if awarded, the report must specify to whom.⁴ When no request as to costs is made, and none are awarded, the case cannot be sent back for a finding in regard thereto on the certificate of the referee that he intended to award them to plaintiff.⁵ After the referee has made his report he cannot proceed and take the account; he is *functus officio*, and cannot act again without the order of the court.⁶ If where a counterclaim is interposed, the referee finds defendants claim is equal to plaintiffs demand, he must order judgment for the defendant; if less, for plaintiff for the balance; if in excess, for the excess, or for so much as is due the defendant.⁷ Where a counterclaim for affirmative relief is established, judgment therefor must be ordered;⁸ where defendant has offered to liquidate damages conditionally under section 736 of the Code of Civil Procedure, the referee must, if he finds that damages do not exceed the amount named ascertain and determine the expense necessarily incurred in preparing for the trial of the question of damages.⁹ In an action by a private person for a penalty or forfeiture given by statute, the referee may award to the plaintiff as damages the whole sum, or such part thereof as he deems proportionate to the

N. Y. Super. 1863, McCartan v. Van Syckel, 23 Super. 694.

¹ N. Y. Super. 1880, Hathaway v. Russell, 46 Super. 103; Sup'm. Ct. 1874, Mundorf v. Mundorf, 1 41 Hun, ; see 59 N. Y. 635; N. Y. Super. 1869, Trufaut v. Merrill, 37 How. 531.

² N. Y. Super. 1880, Hathaway v. Russell, 46 Super. 103.

³ N. Y. Super. 1880, Hathaway v. Russell, 46 Super. 103; N. Y. Su-

per. 1851, Wiggins v. Gans, 6 Super. 646; Sup'm. Ct. 1874, Mundorf v. Mundorf, 1 Hun, 41.

⁴ Code Civ. Proc. § 1022.

⁵ Sup'm. Ct. 1886, First Nat. Bank v. Levy, 41 Hun, 461.

⁶ Sup'm. Ct. 1874, Mundorf v. Mundorf, 1 Hun, 41. N. Y. Super. 1869, Trufaut v. Merrill, 37 How.

⁷ Code Civ. Proc. § 503.

⁸ Code Civ. Proc. § 504.

⁹ Code Civ. Proc. § 737.

offense.¹ In a replevin suit the report must fix the value of the chattel or give reason for failure so to do.² Where judgment is rendered on the pleadings no findings of fact are required.³ When on the trial the complaint is dismissed on plaintiff's proof, the referee may report that he dismissed the complaint on plaintiff's own showing, and direct the entry of judgment of dismissal.⁴ If plaintiff does not appear on the trial, the referee should report the fact, and his decision of a dismissal of the complaint.⁵ He may make an amended report while sojourning abroad.⁶ The report is the property of neither party; either may use it to obtain such judgment as the issues, evidence, and report warrant.⁷ Before it is confirmed and judgment entered thereon, the successful party obtains no vested right thereto. Until entry of judgment it is subject to the power of the court, and to any act of the legislature affecting the remedy.⁸

§ 2. **Delivering or Filing Report.**—The report must be delivered or filed within sixty days after the cause is finally submitted. If not so delivered or filed the reference may be terminated on notice by either party, the action proceed as if no reference had been ordered, and the referee forfeits his fees.⁹ The right to terminate for failure to deliver or file the report within the sixty days is absolute,¹⁰ the time to report may be extended by order of the court,¹¹ or by stipulation of the parties;¹² the sixty days do not begin to run until the time for submitting briefs has passed,¹³ and where

¹ Code Civ. Proc. § 1898.

² Code Civ. Proc. §§ 1726; 1727.

³ 1880, *Eaton v. Welles*, 82 N. Y. 576; N. Y. Super. 1886, *Martin v. Smith*, 53 Super. 277.

⁴ N. Y. Super. 1874, *Bishop v. Empire Co.* 37 Super. 12.

⁵ N. Y. Super. 1852, *Salter v. Malcolm*, 8 Super. 596.

⁶ Sup'm. Ct. 1873, *Cooley v. Decker*, 47 How. 188.

⁷ Sup'm. Ct. 1866, *Sutherland v. Rose*, 47 Barb. 144.

⁸ Sup'm. Ct. 1872, *Lowenthal v. Mayor*, 61 Barb. 511.

⁹ Code Civ. Proc. § 1019.

¹⁰ Ct. App. 1870, *Gregory v. Cryder*, 10 Abb. N. S. 289.

¹¹ Com. Pl. 1866, *Theisselin v. Rossett*, 3 Abb. N. S. 54; N. Y. Super. Sp. T. 1866, *Halsey v. Carter*, 29 Super. 535.

¹² 1874, *Ballou v. Parsons*, 55 N. Y. 673; Sup'm. Ct. Sp. T. 1863, *Foster v. Bryan*, 16 Abb. 396; 26 How. 164.

¹³ Sup'm. Ct. Sp. T. 1886, *Morrison v. Lawrence*, 2 How. N. S. 72.

the attorneys by letter proposed a future day for hearing, but fixed no time for the decision, it was held that the sixty days began to run from the day fixed for the hearing.¹ Where the time has been indefinitely extended by stipulation in open court, the time to report does not begin to run until the extension is terminated by notice or by order.² That counsel has neglected to leave with the referee, the papers used on the trial, is no excuse for not filing the report within sixty days.³ The right to terminate may be exercised by either party,⁴ but a party who has appeared by attorney cannot give the notice;⁵ nor can one at whose request the report was kept off the files;⁶ nor can it be given after the report is filed, although the case has been sent back for further findings.⁷ Failure to give the notice until after the report is filed, is a waiver of the right.⁸ Any notice distinctly informing the opposite party of an election to end the reference is sufficient,⁹ and terminates all further right of the referee to proceed.¹⁰ To prevent termination by notice, the report must be actually delivered or filed; an offer to deliver on payment of the fees is insufficient.¹¹ A notice after the sixty days, and before the report is filed, terminates the authority of the referee.¹² The words "shall forfeit his fees," and the words "the reference must proceed as if no reference had been directed," are imperative.¹³ This section does not apply to a reference of a disputed

¹ Sup'm. Ct. 1875, *Richards v. Bloom*, 5 Hun. 182.

² 1874, *Ballou v. Parsons*, 55 N. Y. 673; Com. Pl. 1866, *Thiesselin v. Rossett*, 3 Abb. N. S. 54.

³ Ct. App. 1870, *Gregory v. Cryder*, 10 Abb. N. S. 289.

⁴ Sup'm. Ct. 1875, *Richards v. Bloom*, 5 Hun. 182; Ct. App. 1870, *Gregory v. Cryder*, 10 Abb. N. S. 289.

⁵ N. Y. Super. 1866, *Halsey v. Carter*, 29 Super. 533.

⁶ Sup'm. Ct. 1886, *Dwyer v. Hoffman*, 39 Hun. 360.

⁷ Sup'm. Ct. 1879, *Parker v. Baxter*, 19 Hun. 410.

⁸ Sup'm. Ct. 1864, *Mantles v. Myle*, 26 How. 409.

⁹ Ct. App. 1870, *Gregory v. Cryder*, 10 Abb. N. S. 289; Sup'm. Ct. 1864, *Niles v. Maynard*, 28 How. 390.

¹⁰ Sup'm. Ct. Sp. T. 1873, *Ballou v. Parsons*, 67 Barb. 19; Ct. App. 1870, *Gregory v. Cryder*, 10 Abb. N. S. 289.

¹¹ 1885, *Little v. Lynch*, 99 N. Y. 112; Sup'm. Ct. 1880, *Phipps v. Carman*, 23 Hun. 150; 84 N. Y. 650.

¹² Sup'm. Ct. Sp. T. 1863, *Livingston v. Gidney*, 25 How. 1.

¹³ Sup'm. Ct. 1864, *Niles v. Maynard*, 28 How. 390.

claim against an executor or administrator.¹ The report should be delivered to the successful party; if delivered to the unsuccessful one, the court will order him to file it within a certain time, and if not so filed, that the referee make a new report.² The referee is not bound to deliver or file his report until his fees are paid.³ There is no limitation of his power to make a valid report after the sixty days have expired, if neither party has taken steps to terminate the reference.⁴ Where, after the referee has made and signed, but not delivered or filed his report, he consents to have re-argument, but does not make or file a new report within sixty days after such re-argument, he cannot, after notice of termination make a valid delivery of the report already made and signed.⁵

§ 3. **Fees of Referee.**—The compensation of a referee is fixed by statute at six dollars for each day spent in the business of the reference. A smaller sum may be prescribed by the order of reference, or a greater one may be fixed by written agreement between the parties at or before the beginning of the hearing.⁶ The agreement must be in writing, must be made before the trial or hearing has begun, must fix the rate, and must be signed by the parties or their attorneys;⁷ an agreement made after the beginning of the trial is invalid;⁸ so is one entered on the minutes of the referee, but not signed;⁹ the former rule to the contrary

¹ Sup'm. Ct. Sp. T. 1864, *God-ding v. Porter*, 17 Abb. 374.

² Com. Pl. 1852, *Richards v. Allen*, 11 N. Y. Leg. Obs. 159.

³ Com. Pl. 1879, *Fischer v. Raab*, 58 How. 221; 1880, *Geib v. Topping*, 83 N. Y. 46.

⁴ Sup'm. Ct. Sp. T. 1863, *Foster v. Bryan*, 16 Abb. 396; Com. Pl. 1866, *Theisselin v. Rossett*, 3 Abb. N. S. 54; Sup'm. Ct. 1864, *Mantles v. Myle*, 26 How. 409; Sup'm. Ct. 1863, *Livingston v. Gidney*, 25 How. 1.

⁵ 23 Sup'm. Ct. 1862, *Leitch v. Brotherson*, 25 How. 407.

⁶ Code Civ. Proc. § 3296.

⁷ Code Civ. Proc. § 3296; Sup'm. Ct. 1868, *Chase v. James*, 16 Hun, 14; *Marks v. City of Buffalo*, 87 N. Y. 184; 1879, *First Nat. Bank v. Tamajo*, 77 N. Y. 476.

⁸ Sup'm. Ct. 1878, *Chase v. James*, 16 Hun. 14.

⁹ 1879, *First Nat. Bank v. Tamajo*, 77 N. Y. 476; Sup'm. Ct. 1878, *Chase v. James*, 16 Hun, 14; Sup'm. Ct. 1883, *Greenwood v. Marvin*, 29 Hun, 99; 1881, *Marks v. City of Buffalo*, 87 N. Y. 184; N. Y. Super. Sp. T. 1880, *Rust v. Hauselt*, 8 Abb. N. C. 148.

has been abrogated by the Code of Civil Procedure, and the decisions thereunder.¹ A stipulation for a fixed sum for each hearing does not extend to days on which no hearing was had, nor meeting or appearance before the referee, the parties having given him notice of postponement.² If the parties refuse to make an agreement, and the referee is unwilling to proceed at the statutory rate, he must decline the reference;³ if he refuses to do either, the court may remove him and appoint another in his stead.⁴ A receiver has no power to make such agreement.⁵ In the absence of allegations of fraud the court has no control over the stipulation;⁶ it is not the employer of the referee, and has no responsibility for his fees.⁷ In the absence of an express stipulation, the attorney is not liable therefor,⁸ but where the attorney has agreed to pay he will be held to his promise,⁹ which may be enforced by action thereon;¹⁰ if, in such action he recovers it must be under the statute, not on a *quantum meruit*.¹¹ The cause of action is assignable.¹² An agreement between the parties that each will pay one-half the fees may be enforced by action.¹³ Before proceeding with the hearing the referee may require that his compensation shall be made reasonably certain;¹⁴ while he might require it to be paid in advance, or the court could order them deposited, such a course could be adopted only under peculiar and unusual circumstances.¹⁵

¹ Sup'm. Ct. 1883, *Greenwood v. Marvin*, 29 Hun, 99. Y. 45; 1880, *Bonyng v. Field*, 81 N. Y. 160; Sup'm. Ct. Sp. T. 1845,

² 1887, *Mead v. Tuckerman*, 105 N. Y. 557. Howell v. Kinsey, 1 How. 105.

³ Com. Pl. 1878, *Devlin v. Mayor*, 11 Abb. N. C. 124; 63 How. 298.

⁴ Sup'm. Ct. 1878, *Ellsworth v. Brown*, 16 Hun, 1; 56 How. 237; 10 Ct. App. 1859, *Judson v. Gray*, 17 How. 289.

⁵ Com. Pl. 1878, *Devlin v. Mayor*, 7 Daly, 466. 11 Com. Pl. 1882, *Riddle v. Cram*, 10 Daly, 401.

⁶ Sup'm. Ct. 1882, *People v. Continental Co.* 15 Week. Dig. 569. 12 Ct. App. 1859, *Disosway v. Winant*, 33 How. 460.

⁷ 1881, *Marks v. City of Buffalo*, 87 N. Y. 184. 13 Sup'm. Ct. Sp. T. 1881, *Buck v. Fowler*, 61 How. 153; Com. Pl. Sp. T. 1880, *Bloodgood v. Bloodgood*, 59 How. 42.

⁸ Sup'm. Ct. 1882, *Matter of Continental Co.* 27 Hun, 524. 14 1880, *Fischer v. Raab*, 81 N. Y. 235.

⁹ 1854, *Judson v. Gray*, 11 N. Y. 408; 1880, *Geib v. Topping*, 83 N. Brown, 16 Hun 1.

One against whom a reference is directed cannot be required to pay in advance. If the referee persists in proceeding under such conditions his report will be vacated and a new referee appointed on terms.¹ The referee has a lien on the report for his fees and is not bound to file or deliver it until they are paid;² the court has no power to compel the successful party to pay them and take up the report,³ but it may make an order that upon his failure so to do, the unsuccessful party may, and enter judgment thereon without costs,⁴ and may, in a wife's action for divorce, compel the husband to furnish means to take up a report in her favor.⁵ Where the referee is ordered to take and state the accounts of an officer of the court, the order may provide that the fees shall be paid out of the fund,⁶ but a receiver will not be ordered to pay the fees of a referee appointed on the petition of a former receiver for payment of his compensation,⁷ nor can such receiver be ordered to pay those of a referee to take proofs touching the compensation of a receiver, until the report of the referee on the accounting is filed.⁸ If the prevailing party refuses to take up the report the referee may file it and sue for his fees;⁹ if there is a dispute as to the amount they must be taxed;¹⁰ if the time spent is questioned it must be supported by the affidavit of the referee;¹¹ his certificate is insufficient.¹² Time spent in the consideration of the case, and drawing the report is spent in the business of the refer-

¹ Sup'm. Ct. 1881, *Armstrong v. Cummings*, 4 Law Bul. 4.

² Com. Pl. Sp. T. 1877, *Devlin v. Mayor*, 54 How. 64; Com. Pl. 1879, *Fischer v. Raab*, 58 How. 221; 1880, *Geib v. Topping*, 83 N. Y. 46; 1885, *Little v. Lynch*, 99 N. Y. 112.

³ 1880, *Geib v. Topping*, 83 N. Y. 46.

⁴ Sup'm. Ct. Chamb. 1859, *Richmond v. Hamilton*, 9 Abb 71 n.

⁵ Com. Pl. Sp. T. 1885, *Early v. Early*, 2 How. N. S. 239.

⁶ 1883, *Att'y-Gen. v. Continental Co.* 93 N. Y. 45.

⁷ Sup'm. Ct. 1882, *Matter of Continental Co.* 24 Hun. 524.

⁸ Sup'm. Ct. 1882, *Clapp v. Clapp*, 38 Hun. 540.

⁹ 1885, *Little v. Lynch*, 99 N. Y. 112.

¹⁰ Sup'm. Ct. Chamb. 1859, *Richmond v. Hamilton*, 9 Abb. 71 n; 1880, *Grib v. Topping*, 83 N. Y. 46.

¹¹ N. Y. Super. 1873, *Brown v. Windmuller*, 36 Super. 75; Com. Pl. Sp. T. 1859, *Shultz v. Whitney*, 9 Abb. 71; 17 How. 471.

¹² N. Y. Super. 1873, *Brown v. Windmuller*, 36 Super. 75.

ence.¹ The affidavit must show what time was spent in the hearing, and what in examining the case, and drawing the report.² No charge can be made for adjournments where the stipulation provides that the referee shall receive twenty dollars per day for each hearing; the adjournments having been arranged by counsel, and notice thereof given to the referee, there being no appearance before him;³ nor can a charge be made for the services of a third person who took evidence in the absence of the referee.⁴ In the absence of an agreement, the court cannot allow more than the statutory fees,⁵ nor can such increased rate be given as an allowance for services.⁶ The affidavit to support the fees paid must affirmatively show that the time spent would make the sum named at the legal rate.⁷ Where two actions are tried before the same referee at the same time and the same disposition is made in each, one-half the legal fees are taxable in each.⁸ In the absence of any provision of law to the contrary, the fees of a referee to carry a judgment into effect may be taxed by the court.⁹ While the court has the power, it will not order the fees of a referee, whose duties relate to a receivership, his claims or accounts, to be paid out of the fund until his report on the accounting is filed.¹⁰ The referee may appeal from an order made in an action that deprives him of a part of his fees,¹¹ but on such

¹ Sup'm. Ct. Sp. T. 1879, *Herschell v. Rogers*, 2 Law Bul. 14; N. Y. Super. 1873, *Brown v. Windmuller*, 36 Super. 75.

² N. Y. Super. 1873, *Brown v. Windmuller*, 36 Super. 75.

³ 1887, *Mead v. Tuckerman*, 105 N. Y. 557.

⁴ Com. Pl. Sp. T. 1859, *Schultz v. Whitney*, 9 Abb. 71; N. Y. Super. 1871, *Metcalf v. Baker*, 34 Super. 10.

⁵ Com. Pl. Sp. T. 1859, *Shultz v. Whitney*, 9 Abb. 71; 17 How. 471; Sup'm. Ct. 1878, *Chase v. James*, 16 Hun, 14; 1882, *Schloemer v. Schloemer*, 49 N. Y. 82; 1879, *First Nat. Bank v. Tamajo*, 77 N. Y. 476.

⁶ Sup'm. Ct. 1874, *Innes v. Purcell*, 2 T. & C. 538; 1879, *First Nat. Bank v. Tamajo*, 77 N. Y. 476.

⁷ 1872, *Watson v. Gardiner*, 50 N. Y. 671.

⁸ Com. Pl. Sp. T. 1883, *Byrne v. Groot*, 5 Law Bul. 56; Sup'm. Ct. 1878, *Colton v. Simmons*, 14 Hun. 75.

⁹ Sup'm. Ct. 1881, *Hobart v. Hobart*, 23 Hun. 484; Com. Pl. 1870, *Lynch v. Meyers*, 3 Daly, 256.

¹⁰ Sup'm. Ct. 1885, *Clapp v. Clapp*, 38 Hun, 540.

¹¹ Sup'm. Ct. 1881, *Hobart v. Hobart*, 23 Hun, 484.

appeal the burden is on him to show affirmatively that they were improperly taxed.¹ Fees on an interlocutory reference are a proper disbursement to be allowed to a prevailing party in his costs,² so are rent, light and fuel where the sittings are had at a place other than the referee's office.³ The party who procures a reference to take and state an account is liable for the fees where no final determination is made.⁴ An agreement that the referee shall have a first lien on the judgment for his fees disqualifies him from settling the case, and avoids the order of reference.⁵

§ 4. **When the Power of Referee Ceases.**—The order of reference is not affected by the death of one party and the substitution of another. The pleadings and all other proceedings remain valid and operative;⁶ nor does the death of a referee appointed on motion in a referable case avoid the order,⁷ but the rule is otherwise where the referee was appointed by consent;⁸ nor does the appointment of the referee as a justice of the supreme court. The reference may be resumed after the term has expired;⁹ but it does terminate by the making and filing or delivery of his report. Thereafter, where the issues have been referred, he has only to perform the ministerial duty of settling the case.¹⁰ It is not terminated by an order allowing an amendment of

¹ Sup'm. Ct. 1881, *Hobart v. Hobart*, 23 Hun, 484.

² Sup'm. Ct. 1875, *Pitkin v. Coolsey*, 5 Hun, 48.

³ Sup'm. Ct. 1834, *Bailey v. Hanford*, 10 Wend. 622.

⁴ Ct. App. 1859, *Judson v. Gray*, 17 How. 289.

⁵ 1883, *Leonard v. Mulry*, 93 N. Y. 392.

⁶ Sup'm. Ct. 1873, *Chittenango Co. v. Stewart*, 67 Barb. 423; 1871, *Moore v. Hamilton*, 44 N. Y. 666.

⁷ Com. Pl. 1880, *Devlin v. Mayor*, 9 Daly, 334; 62 How. 163.

⁸ Com. Pl. 1880, *Devlin v. Mayor*, 9 Daly, 334.

⁹ Com. Pl. 1871, *Schemerhorn v. Wood*, 4 Daly, 158; Sup'm. Ct. 1880, *Countryman v. Norton*, 21 Hun, 17.

¹⁰ Com. Pl. 1876, *Devlin v. Mayor*, 6 Daly, 486; 54 How. 11; Sup'm. Ct. 1859, *Pratt v. Stiles*, 17 How. 211; Sup'm. Ct. Sp. T. 1861, *Sheenan v. Justice*, 22 How. 241; N. Y. Super. Sp. T. 1862, *Niles v. Price*, 23 How. 473; Sup'm. Ct. 1867, *Leffler v. Field*, 33 How. 385; N. Y. Super. 1869, *Trufant v. Merrill*, 37 How. 531; Sup'm. Ct. 1864, *Cooper v. Bowles*, 42 Barb. 87; Sup'm. Ct. 1867, *Vorhis v. Vorhis*, 50 Barb. 119; Sup'm. Ct. 1864, *Nelson v. Ingersoll*, 27 How. 1.

the pleadings, unless so stated in the order,¹ but is by notice of election to end the reference because the report is not filed or delivered within sixty days after the cause is finally submitted.² While a reference was pending in an action against the city of New York, the legislature passed an act providing that no judgment except on an issue of law should be entered save by verdict of a jury; held, the reference terminated when the act became a law.³

§ 5. **Setting aside the Report on Motion.**—While the proper method of reviewing the proceedings before a referee to hear and determine is by appeal from the judgment entered on the report, the court may, on motion at special term, in a proper case, and for sufficient cause, set aside the report and the judgment entered thereon.⁴ Any irregularity on the part of the referee that has not been waived by the parties may be so corrected.⁵ Proceeding with the trial after knowledge of irregularity or misconduct is a waiver;⁶ but the failure to act promptly may be excused.⁷ Where irregularity or bias is shown, the court will not stop to inquire whether or not it has affected the decision. The report will be set aside and the order of reference vacated where there is opportunity of imputing bias, though none be shown;⁸ even though the integrity of the referee is un-

¹ Sup'm. Ct. 1876, *Kiersted v. Ct. 1885, Burrows v. Dickinson*, 35 Orange Co. 54 How. 29. Hun, 492; Sup'm. Ct. 1883, *Carroll*

² Ct. App. 1870, *Gregory v. Cryder*, 10 Abb. N. S. 289. *v. Lufkin*, 29 Hun, 17; N. Y. Super. 1871, *Metcalf v. Baker*, 34 Super. 10.

³ Sup'm. Ct. 1872, *Lowenthal v. Mayor*, 61 Barb. 511. ⁷ Sup'm. Ct. 1884, *Greenwood v. Marvin*, 29 Hun, 99; Sup'm. Ct. 1885, *Burrows v. Dickinson*, 35 Hun, 492.

⁴ Sup'm. Ct. 1885, *Burrows v. Dickinson*, 35 Hun, 492; 1883, *Leonard v. Mulry*, 93 N. Y. 392. ⁸ Sup'm. Ct. Sp. T. 1851, *Dorlon v. Lewis*, 9 How. 1; Sup'm. Ct. Sp. T. 1849, *Yale v. Gwinits*, 4 How. 253; Sup'm. Ct. 1883, *Carroll v. Lufkin*, 29 Hun, 17; N. Y. Super. 1871, *Gray v. Fisk*, 42 How. 135; Sup'm. Ct. Sp. T. 1873, *Livermore v. Bainbridge*, 44 How. 357; Sup'm. Ct. 1873, *Stebbins v. Brown*, 65 Barb. 272.

⁵ Sup'm. Ct. 1878, *Fulmer v. Fulmer*, 6 Week. Dig. 22; Sup'm. Ct. Sp. T. 1851, *Dorlon v. Lewis*, 9 How. 1; Sup'm. Ct. 1849, *Yale v. Gwinits*, 4 How. 253; Sup'm. Ct. Sp. T. 1855, *Roosa v. Saugerties Co.* 12 How. 297.

⁶ N. Y. Super. 1856, *McPherson v. Romer*, 40 Super. 448; Sup'm.

questioned,¹ and no wrong has been proven.² It will be done as a matter of public policy where the referee has promised to decide first in favor of one party and then of the other, though there is no suspicion of the integrity of the referee.³ A like order will be made where, after his appointment, he has accepted a retainer from either party.⁴ A motion to set aside for fraud and collusion will be denied unless the evidence would be sufficient to maintain an action for that purpose;⁵ impropriety must be proved, not surmised.⁶ The court alone can determine whether there are any relations between the plaintiff, or his assignor, and the referee that make it improper for him to hear and decide the cause.⁷ It will set aside the report where, during the progress of the trial, the referee examined machinery, the subject of the action, and received explanations thereof from plaintiff's witnesses in the absence of defendant;⁸ so where, after the evidence was closed and the case submitted, the referee wrote an opinion in favor of defendant, showed it to plaintiff, who persuaded him to alter his decision;⁹ or where, after the case is finally submitted, the referee, after trying in vain to get a stipulation for fees largely in excess of the statutory rate, finally delivered the report upon receiving a bond and mortgage for the amount of such excessive fees;¹⁰ or where, after the case was closed, and after final submission, he advised one of the parties to compromise, suggesting terms;¹¹ or where, upon consultation, three referees were unable to agree, but subsequently

¹ Sup'm. Ct. Sp. T. 1851, *Dorlon v. Lewis*, 9 How. 1. *Fiske*, 33 Super. 484; 42 How. 135; 12 Abb. N. S. 213.

² Sup'm. Ct. 1883, *Greenwood v. Marvin*, 29 Hun, 99; Sup'm. Ct. Sp. T. 1855, *Roosa v. Saugerties Co.* 12 How. 297; Sup'm. Ct. 1883, *Carroll v. Lufkin*, 29 How. 17. ⁷ 1878, *Baird v. Mayor*, 74 N. Y. 382.

³ Sup'm. Ct. Sp. T. 1849, *Yale v. Gwinits*, 4 How. 253.

⁴ Sup'm. Ct. 1851, *Dorlon v. Lewis*, 9 How. 1.

⁵ Sup'm. Ct. Sp. T. 1855, *Roosa v. Saugerties Co.* 12 How. 297. ¹⁰ Sup'm. Ct. 1883, *Greenwood v. Marvin*, 29 Hun, 99.

⁶ Sup'm. Ct. 1873, *Stebbins v. Brown*, 65 Barb. 271. ¹¹ Sup'm. Ct. 1873, *Livermore v. Bainbridge*, 14 Abb. N. S. 227; 47 How. 350.

⁸ Sup'm. Ct. Sp. T. 1859, *Accessory Co. v. Garrison*, 18 How. 1.

⁹ N. Y. Super. 1871, *Gray v.*

a report was drawn up and signed by two separately.¹ Where during the progress of the trial, the referee importuned the unsuccessful party for aid in securing a political appointment, the report was set aside and the reference vacated.² A like order was made where each of two referees in different actions is acting as referee in the other;³ so where the circumstances created a suspicion of improper conduct.⁴ The report will not be set aside for misconduct with the unsuccessful party;⁵ nor because the judge who signed an order of reference entered by consent was a relative of one of the parties;⁶ nor simply because the referee has expressed himself against the character of the action.⁷ Where misconduct is the ground of the motion the burden of proof is on the moving party.⁸ The motion to set aside for irregularity cannot be made after judgment is entered.⁹ A motion to set aside a report directing an interlocutory judgment, and for a new trial on exceptions may be made at general term;¹⁰ from the order made thereon an appeal will lie to the Court of Appeals.¹¹ Such motion should be made before proceeding with the reference under the interlocutory decree.¹² It may be made without taking an appeal from the judgment; but in that case proceedings under the decree are not stayed.¹³ The general term may allow the appellant to withdraw the notice of appeal, and make a motion for a new trial on payment of costs.¹⁴ An

¹ N. Y. Super. 1870, *Townsend v. Glens Falls Co.* 10 Abb. N. S. 277.

² Sup'm. Ct. 1885, *Burrows v. Dickinson*, 35 Hun, 492.

³ Sup'm. Ct. 1883, *Carroll v. Lufkin*, 29 Hun, 17.

⁴ Sup'm. Ct. 1877, *Harlem Bank v. Todd*, 4 Week. Dig. 74.

⁵ N. Y. Super. 1871, *Gray v. Fiske*, 42 How. 135; Sup'm. Ct. Chamb. 1883, *Gilbert v. Hotchkiss*, Daily Reg. Jan 2, 1883.

⁶ Sup'm. Ct. 1879, *Bell v. Ver-noy*, 18 Hun, 125.

⁷ Sup'm. Ct. Sp. T. 1882, *Donnelly v. Donnelly*, 63 How. 481.

⁸ Sup'm. Ct. Sp. T. 1882, *Donnelly v. Donnelly*, 63 How. 481; N. Y. Super. 1871, *Gray v. Fiske*, 12 Abb. N. S. 213.

⁹ N. Y. Super. 1876, *McPherson v. Romer*, 40 Super. 448.

¹⁰ Code Civ. Proc. § 1001; 1875, *Johnson v. Youngs*, 65 N. Y. 599.

¹¹ 1875, *Johnson v. Youngs*, 65 N. Y. 599.

¹² Sup'm. Ct. 1874, *Church v. Kidd*, 3 Hun, 254.

¹³ Sup'm. Ct. 1877, *Bennett v. Austin*, 10 Hun, 451.

¹⁴ Sup'm. Ct. 1875, *Douglas v. Douglas*, 5 Hun, 140.

offer by one of the parties, in the presence of the other, to be responsible to the referee for a compensation in excess of the statutory rate, which is at once rejected, does not disqualify the referee from acting.¹ The court, on motion at special term, may set aside any order the referee had no authority to make ;² may set aside the report for irregularity, surprise or newly discovered evidence ;³ or for any cause for which the verdict of a jury would be set aside.⁴ After an action in equity has been heard and determined, and no award of costs made, the case cannot be sent back for a determination as to costs.⁵ Where the report has been set aside for an irregularity that has been cured, the court, in sending back the cause for a re-hearing, may direct that the evidence taken on the first trial be used on the second.⁶

§ 6. **Costs and Adjustment.**—Costs may be adjusted on notice, and the amount thereof inserted in the judgment ;⁷ or the amount thereof may be inserted in the judgment before taxation, and notice of re-adjustment given.⁸ The clerk cannot refuse to tax the costs on entering judgment on the ground that the report was irregularly obtained.⁹ If the fees of the referee are disputed, they must be sustained by his affidavit ;¹⁰ his certificate is insufficient.¹¹ The affidavit must show what time was spent in the hearing,

¹ Com. Pl. Sp. T. 1877, *Devlin v. Mayor*, 54 How. 64.

² Sup'm. Ct. Sp. T. 1868, *Ford v. Ford*, 53 Barb. 525.

³ N. Y. Super. Sp. T. 1879, *Hathaway v. Russell*, 45 Super. 103 ; Sup'm. Ct. 1859, *Pratt v. Stiles*, 17 How. 211 ; Sup'm. Ct. 1858, *Bishop v. Main*, 17 How. 162 ; Sup'm. Ct. Sp. T. 1857, *Peck v. Yorks*, 14 How. 416.

⁴ Supm. Ct. 1873, *Livermore v. Bainbridge*, 44 How. 357.

⁵ Sup'm. Ct. 1886, *Bank v. Levy*, 41 Hun, 461 ; See *Gardiner v. Schwab*, 34 Hun, 582.

⁶ 1878, *Roberts v. White*, 73 N. Y. 375.

⁷ N. Y. Super. 1849, *Renouil v. Harris*, 4 Super. 641 ; Ct. App. 1866, *Cotes v. Smith*, 31 How. 146 ; 29 How. 326.

⁸ Ct. App. 1866, *Cotes v. Smith*, 31 How. 146.

⁹ Sup'm. Ct. 1873, *Ballou v. Parsons*, 67 Barb. 19 ; 55 N. Y. 673.

¹⁰ N. Y. Super. 1873, *Brown v. Windmuller*, 36 Super. 75 ; 14 Abb. N. S. 359 ; Com. Pl. Sp. T. 1859, *Shultz v. Whitney*, 9 Abb. 71 ; 17 How. 471.

¹¹ N. Y. Super. 1873, *Brown v. Windmuller*, 36 Super. 75 ; 14 Abb. N. S. 359.

in examining the case, and in drawing the report.¹ No charge can be made for adjournments arranged by counsel, and notice thereof given to the referee, there being no appearance before him, and the stipulation providing only for time spent in the hearing.² In the absence of a stipulation the court can allow only the statutory fee;³ nor can it make an allowance to the referee for services.⁴ The affidavit must show that the time spent would make the sum charged at the statutory or agreed rate;⁵ must show that the time charged for was necessarily employed.⁶ Fees of a referee on an interlocutory reference are a proper disbursement to be allowed the prevailing party in his costs;⁷ so are rent, light and fuel where the sittings are held at a place other than the referee's office.⁸ Stenographer's fees are not, save by stipulation of the party.⁹ In difficult and extraordinary cases an additional allowance may be granted;¹⁰ application therefor must be made before final costs are adjusted,¹¹ to the court appointing the referee, on notice and affidavits.¹² The moving papers must show such facts as will enable the court to form its own opinion of the

¹ N. Y. Super. 1873, *Brown v. Windmuller*, 36 Super. 75; 14 Abb. N. S. 359; Sup'm. Ct. Sp. T. 1879, *Herschell v. Rogers*, 2 Law. Bul. 15.

² 1887, *Mead v. Tuckerman*, 105 N. Y. 557.

³ Com. Pl. Sp. T. 1859, *Shultz v. Whitney*, 9 Abb. 71; 17 How. 471; Sup'm. Ct. 1878, *Chase v. James*, 16 Hun, 14; 1872, *Schloemer v. Schloemer*, 49 N. Y. 82; 1879, *First Nat. Bank v. Tamajo*, 77 N. Y. 476.

⁴ Sup'm. Ct. 1874, *Innis v. Purcell*, 2 T. & C. 538; 1879, *First Nat. Bank v. Tamajo*, 77 N. Y. 476.

⁵ *Watson v. Gardiner*, 50 N. Y. 671.

⁶ N. Y. Super. 1873, *Brown v. Windmuller*, 36 Super. 75; 14 Abb. N. S. 359.

⁷ Sup'm. Ct. 1875, *Pitkin v. Cooley*, 5 Hun, 48.

⁸ Sup'm. Ct. 1834, *Bailey v. Hanford*, 10 Wend. 622.

⁹ Sup'm. Ct. 1878, *Colton v. Simmons*, 14 Hun, 75; 1881, *Marks v. Buffalo*, 87 N. Y. 184; N. Y. Super. 1881, *Newhall v. Appleton*, 4 Law Bul. 5; Com. Pl. Sp. T. 1883, *Byrne v. Groot*, 5 Law Bul. 56.

¹⁰ Code Civ. Proc. § 3253.

¹¹ Rule 44; 1866, *Clarke v. Rochester*, 34 N. Y. 355; Sup'm. Ct. 1885, *Jones v. Wakefield*, 21 Week. Dig. 287.

¹² Sup'm. Ct. Sp. T. 1850, *Howe v. Muir*, 4 How. 252; Sup'm. Ct. Sp. T. 1853, *Osborne v. Betts*, 8 How. 31; Sup'm. Ct. Sp. T. 1858, *Main v. Pope*, 16 How. 271; Sup'm. Ct. 1885, *Bear v. Am. Rapid Tel. Co.* 36 Hun, 400; N. Y. Super. 1867, *Gori v. Smith*, 29 Super. 563; 3 Abb. N. S. 51.

nature of the case;¹ a certificate of the referee showing what took place on the trial should also be furnished.² But one extra allowance can be granted.³ Where the report was set aside for the misconduct of the referee, the party taking it up cannot be allowed the referee's fees as a disbursement.⁴ Where a party is by statute entitled to increased costs, the referee must make a certificate to that effect;⁵ the certificate must be of some fact appearing on the trial, not of things extrinsic thereto, of which the court or referee may have no knowledge.⁶ It may be filed *nunc pro tunc*, even after argument at special term;⁷ should state how many issues were joined, what findings were made on such issues, and the fact that the party is entitled to the increased costs.⁸ The certificate is conclusive on the taxing officer;⁹ if erroneous, it may be vacated on motion at special term.¹⁰ A party alleging errors in the fees of a referee must move for re-adjustment, pointing out the error.¹¹

§ 7. **Entering Judgment.**—The report of the referee to hear and determine stands as the decision of the court, and except where otherwise expressly provided by law, judgment may be entered thereon by the clerk as directed therein upon filing the decision or report.¹² It is entered as if made by a justice at special term; no direction of a judge

¹ N. Y. Super. 1867, *Gori v. Smith*, 29 Super. 563; Sup'm. Ct. Sp. T. 1849, *Gould v. Chapin*, 4 How. 185.

² Sup'm. Ct. Sp. T. 1849, *Gould v. Chapin*, 4 How. 185; Sup'm. Ct. Sp. T. 1858, *Main v. Pope*, 16 How. 271.

³ Sup'm. Ct. 1879, *Flynn v. Equitable Co.* 18 Hun, 212; N. Y. Super. 1880, *McDonald v. Mallory*, 46 Super. 58.

⁴ Sup'm. Ct. Sp. T. 1883, *Meyer v. Bernheimer*, 5 Law Bul. 46.

⁵ Code Civ. Proc. § 3248.

⁶ 1881, *Bain v. Rochester*, 85 N. Y. 523.

⁷ Com. Pl. 1854, *Snyder v. Beyer*, 3 E. D. S. 235.

⁸ Brooklyn City Ct. Sp. T. 1881, *Hudson v. Guttenberg*, 9 Abb. N. C. 415.

⁹ Sup'm. Ct. 1876, *Lillis v. O'Connor*, 8 Hun, 280; Sup'm. Ct. 1825, *Munford v. Withey*, 1 Wend. 279; Sup'm. Ct. 1831, *Barney v. Keith*, 6 Wend. 555.

¹⁰ Sup'm. Ct. 1876, *Lillis v. O'Connor*, 8 Hun, 280; Sup'm. Ct. 1831, *Barney v. Keith*, 6 Wend. 555.

¹¹ 1881, *Kearney v. McKeon*, 85 N. Y. 136.

¹² Code Civ. Proc. § 1228.

is necessary.¹ The act is merely clerical, no opposition can be justly made thereto.² It is the duty of the clerk to make up the roll, and enter the judgment immediately on filing the report;³ for any omission therein the clerk, not the prevailing party, is responsible;⁴ the prevailing party has no obligation beyond the filing of such papers as in the progress of the trial his adversary requires.⁵ No notice of intent is required save that of the adjustment of costs.⁶ If the entry of judgment precedes such adjustment the amount thereof when ascertained, is to be inserted in blanks left for the purpose.⁷ The judgment should not contain the findings of the referee; his direction that judgment be entered is all that is required.⁸ It cannot be entered until all the issues are disposed of.⁹ If the judgment entered is not such a one as is authorized by the report, the remedy is by motion at special term.¹⁰ The code makes no distinction as to the manner of entry between interlocutory and final judgment ordered by the report; neither can be entered until all the issues are disposed of;¹¹ where that is done the functions of the referee, and, as a necessary consequence, the trial, are terminated, and judgment, whether final or interlocutory, must be entered by the clerk.¹² If

¹ 1860, *Hancock v. Hancock*, 22 N. Y. 568; N. Y. Super. Sp. T. 1867, *Currie v. Cowles*, 35 Super. 3; 1885, *Clapp v. Hawley*, 97 N. Y. 610.

² N. Y. Super. Sp. T. 1867, *Currie v. Cowles*, 30 Super. 3; N. Y. Super. 1849, *Renouil v. Harris*, 4 Super. 641; Sup'm. Ct. Sp. T. 1850, *McMahon v. Allen*, 7 Abb. 1; Sup'm. Ct. 1863, *Bihin v. Bihin*, 17 Abb. 19.

³ Code Civ. Proc. § 1228; N. Y. Super. 1849, *Renouil v. Harris*, 4 Super. 641; Ct. App. 1866, *Cotes v. Smith*, 31 How. 146; 1885, *Clapp v. Hawley*, 97 N. Y. 610; N. Y. Super. 1871, *Metcalf v. Baker*, 34 Super. 10.

⁴ N. Y. Super. 1849, *Renouil v. Harris*, 4 Super. 641.

⁵ N. Y. Super. 1860, *Hunneman v.*

Waterbury, 18 Super. 686; N. Y. Super. 1849, *Renouil v. Harris*, 4 Super. 641.

⁶ Code Civ. Proc. § 1228; N. Y. Super. 1849, *Renouil v. Harris*, 4 Super. 641.

⁷ Ct. App. 1866, *Cotes v. Smith*, 31 How. 146; below, 29 How. 326.

⁸ N. Y. Super. 1867, *Currie v. Cowles*, 30 Super. 3.

⁹ Sup'm. Ct. 1858, *McMahon v. Allen*, 7 Abb. 1; 27 Barb. 335.

¹⁰ Sup'm. Ct. 1880, *Howland v. Howland*, 20 Hun, 472; 1860, *Ingersoll v. Bostwick*, 22 N. Y. 425.

¹¹ Sup'm. Ct. 1850, *McMahon v. Allen*, 7 Abb. 1; 27 Barb. 335; Sup'm. Ct. 1874, *Mundorf v. Mundorf*, 1 Hun, 41.

¹² Code Civ. Proc. § 1228.

an accounting is ordered it may thereafter be directed by the court before the referee who tried the issues, or before another, in its discretion.¹ It is only when questions are reserved by the report to be passed upon by the court that a motion for judgment is necessary;² in the absence of any such reservation the clerk must enter judgment as of course.³ A different practice has some times, perhaps most frequently, been adopted, and is supported by some of the older cases;⁴ but it is not in accordance with the provisions of the Code of Civil Procedure, nor with the later decisions. On a motion for confirmation of the report, and interlocutory judgment thereon, neither the merits nor allegations of error can be considered; and in the absence of proof of irregularity, surprise or newly discovered evidence, judgment will be ordered as of course.⁵ The death of a sole plaintiff after the report is filed does not prevent the entry of judgment against him;⁶ but a report signed, not delivered, after his death cannot have effect by relation.⁷ Formal notice of entry must be given;⁸ the notice must be endorsed and subscribed with the name and address of the party's attorney.⁹

§ 8. **Excepting to the Report.**—An exception to a ruling upon a question of law made after the cause is finally submitted must be taken by filing a notice thereof in the clerk's office, and serving a copy on the attorney for the adverse party. It may be so taken at any time within ten days after service upon the exceptant of a copy of the report, and written notice of the entry of judgment. If made before

¹ Sup'm. Ct. 1874, *Mundorf v. 1856, Palmer v. Palmer*, 13 How. Mundorf, 1 Hun, 41; Code Civ. Proc. § 1230. 363.

² N. Y. Super. Sp. T. 1879, *Hathaway v. Russell* 45 Super. 538; Opinion of Chief Justice. 1885, *Clapp v. Hawley*, 97 N. Y. 610; Code Civ. Proc. § 1231.

³ 1885, *Clapp v. Hawley*, 97 N. Y. 610; Code Civ. Proc. § 1228.

⁴ Sup'm. Ct. Sp. T. 1853, *Bantes v. Brady*, 8 How. 216; Sup'm. Ct.

⁵ N. Y. Super. Sp. T. 1879, *Hathaway v. Russell*, 45 Super. 538.

⁶ N. Y. Super. 1850, *Scranton v. Baxter*, 5 Super. 660.

⁷ Sup'm. Ct. Sp. T. 1860, *Kissam v. Hamilton*, 20 How. 369.

⁸ Code Civ. Proc. § 1251.

⁹ *Kelly v. Sheehan*, 76 N. Y. 325; Rule 2.

judgment it must be entered in the judgment roll ; if after, must be attached thereto. In either case it forms part of the papers upon which the appeal must be heard ;¹ in any other case the exception must be taken when the ruling is made.² When the party relies exclusively on exceptions to erroneous decisions made during the trial, exceptions to the conclusions of law, or to the final decision are unnecessary.³ Where evidence has been received without objection, and the case submitted without objection, an objection in the exceptions to the referee's report is too late.⁴ An exception will not lie to a finding founded on immaterial evidence, unless objection was made to the admission of the evidence, and exception taken.⁵ Exceptions to the conclusions of law in a referee's report are essential to a review of the judgment entered thereon.⁶ Neglect to except to a report defective on its face makes it absolute.⁷ Exceptions are necessary only when questions of law are to be raised ;⁸ they are not required to enable the defeated party to insist that the report is contrary to the evidence.⁹ Findings of fact need no exceptions, nor does a refusal to find a fact when requested.¹⁰ Refusal, when requested, to make any finding on a material question does ;¹¹

¹ Code Civ. Proc. § 994.

² Code Civ. Proc. § 995 ; N. Y. Super. 1873, *Dainese v. Allen*, 36 Super. 98 ; 14 Abb. N. S. 363 ; Sup'm. Ct. 1856, *Brewer v. Irish*, 12 How. 481.

³ N. Y. Super. 1873, *Dainese v. Allen*, 36 Super. 98 ; 14 Abb. N. S. 363 ; N. Y. Super. 1863, *Mayor v. Erben*, 24 How. 358 ; N. Y. Super. 1860, *Frost v. Smith*, 20 Super. 108.

⁴ Sup'm. Ct. 1875, *Gibson v. Stetzer*, 3 Hun, 539.

⁵ 1875, *Oliver v. Burnett*, 65 N. Y. 559.

⁶ Sup'm. Ct. 1877, *Tallmadge v. Whitman*, 11 Hun, 367 ; Sup'm. Ct. 1871, *Russell v. Dufrow*, 4 Lans. 399 ; Sup'm. Ct. 1868, *Leffler v. Field*, 50 Barb. 407.

⁷ Sup'm. Ct. 1874, *Catlin v. Catlin*, 2 Hun, 378 ; 4 T. & C. 664 ; Sup'm. Ct. Chamb. 1884, *Gade v. Gade*, 14 Abb. N. C. 510.

⁸ Sup'm. Ct. 1877, *Met. Gas Co. v. Mayor*, 9 Hun. 706.

⁹ Sup'm. Ct. 1854, *O'Neil v. N. Y. Ag. Soc.* 19 Barb. 162 ; Sup'm. Ct. 1877, *Met. Gas Co. v. Mayor*, 9 Hun, 706 ; Sup'm. Ct. 1883, *Mead v. Smith*, 28 Hun, 639 ; Sup'm. Ct. 1885, *Griffiths v. Phelps*, 21 Week. Dig. 390 ; Sup'm. Ct. 1886, *Spence v. Chambers*, 39 Hun, 193 ; Sup'm. Ct. 1885, *Porter v. Smith*, 35 Hun, 118.

¹⁰ Sup'm. Ct. 1886, *Spence v. Chambers*, 39 Hun, 193 ; Code Civ. Proc. § 993.

¹¹ 1877, *Potter v. Carpenter*, 71 N. Y. 74.

so does failure to find a fact proved by incontestible evidence.¹ No exception will lie to failure to find a fact in the absence of a request.² Exceptions must be filed within the time prescribed, otherwise the right is lost;³ but the court may, on such terms as may be just, allow exceptions to be filed now for then.⁴ Exceptions to requests made on the settlement of the case, if objected to, are too late.⁵ None lies to the refusal of the referee to report the particulars that make up his general finding.⁶ The exception must be specific, not general;⁷ but the same strictness is not required as in exceptions to a charge.⁸ A general exception to all the rulings of law is unavailing if any of them are correct.⁹ An exception to a general conclusion of law that one party is entitled to recover of the other, raises the question whether on all the facts found the party is entitled so to recover.¹⁰ An exception to the conclusion that a party is entitled to recover a sum certain raises the question whether the party is entitled to recover the entire sum.¹¹ A general exception to all the findings, and each

¹ Sup'm. Ct. 1875, *Day v. Mooney*, 6 T. & C. 382; 1872, *Beck v. Sheldon*, 48 N. Y. 365.

² Sup'm. Ct. 1873, *Carroll v. Statton Island Co.* 65 Barb. 32; N. Y. Super. 1865, *Hartford Co. v. N. Y. Co.* 26 Super. 411; 1864, *Ashley v. Marshall*, 29 N. Y. 494; N. Y. Super. 1873, *Balzer v. Newlas*, 35 Super. 203; N. Y. Super. 1860, *N. Y. Co. v. Richmond*, 19 Super. 213.

³ Sup'm. Ct. 1856, *Tremaine v. Rider*, 13 How. 148; Sup'm. Ct. 1866, *Sutherland v. Rose*, 47 Barb. 144; Sup'm. Ct. 1861, *Tyler v. Willis*, 33 Barb. 327; N. Y. Super. 1868, *Hatch v. Fogarty*, 30 Super. 488.

⁴ Code Civ. Proc. §§ 724, 783; Sup'm. Ct. Sp. T. 1884, *Gade v. Gade*, 14 Abb. N. C. 510; Sup'm. Ct. Chamb. 1862, *Booth v. Mullen*, 14 Abb. 228; Sup'm. Ct. Sp. T. 1867, *Sheldon v. Wood*, 14 How. 18;

Sup'm. Ct. 1882, *Matter of Atty. Gen. v. Continental Co.* 46 How. 93.

⁵ 1882, *Ward v. Craig*, 87 N. Y. 550; Sup'm. Ct. 1880, *Palmer v. Phoenix Co.* 22 Hun, 224; Sup'm. Ct. 1882, *Banc v. Neus*; 2 Civ. Proc.; R. 185.

⁶ Sup'm. Ct. 1875, *Avery v. Foley*, 4 Hun, 415.

⁷ 1874, *Ledoux v. R. R. Co.* 61 N. Y. 613; N. Y. Super. 1870, *Jones v. Bridge*, 32 Super. 431; Sup'm. Ct. 1868, *Loomis v. Loomis*, 51 Barb. 257; 1868, *Wheeler v. Billings*, 38 N. Y. 263; 1865, *Newell v. Doty*, 33 N. Y. 83; Ct. App. 1865, *Graham v. Chrystal*, 2 Keyes, 21.

⁸ 1872, *Newlin v. Lyon*, 49 N. Y. 661.

⁹ 1884, *Smith v. Platt*, 96 N. Y. 635.

¹⁰ 1885, *Hemmingway v. Poucher*, 98 N. Y. 281.

¹¹ 1874, *Briggs v. Boyd*, 56 N. Y. 289.

and every of them, raises no specific question, and is of no avail.¹ Only the decision to which exception has been filed can be reviewed on appeal.² If part of a finding is correct, a general exception is unavailable,³ and the same rule applies to a request to find.⁴ No exception lies for error in favor of the party excepting.⁵ An exception by appellant is not available to respondent on appeal.⁶ An extension of time to serve a case does not extend the time to serve exceptions.⁷ An exception to a finding of fact against undisputed evidence raises a question of law.⁸

§ 9. **Making and Settling a Case.**—If the report of the referee directs an interlocutory judgment, it may be reviewed by motion for a new trial at general term;⁹ or by appeal from the interlocutory judgment.¹⁰ If it directs final judgment it may be reviewed by appeal.¹¹ In either event a case must be made and settled as prescribed by the Code and by the rules of practice,¹² unless the party appealing intends to rely solely upon exceptions, filed and served after notice of filing and serving the report, under section 974 of the code.¹³ The ten days within which the case must be made do not begin to run until entry of judgment on the report and notice thereof.¹⁴ The case must contain the evi-

¹ 1892, *Ward v. Craig*, 87 N. Y. 550; 1865, *Newell v. Doty*, 33 N. Y. 83; 1868, *Wheeler v. Billings*, 38 N. Y. 263; 1882, *Mayor v. R. R. Co.* 88 N. Y. 351; *Sup'm. Ct.* 1884, *Riley v. Sexton*, 32 Hun, 245.

² *Ct. App.* 1867, *Brush v. Lee*, 3 Abb. N. S. 204; *Sup'm. Ct.* 1856, *Bronson v. Irish*, 12 How. 481; *Ct. App.* 1856, *Johnson v. Whitlock*, 12 How. 571; *Sup'm. Ct.* 1874, *Union Co. v. Byington*, 1 Hun, 44.

³ 1877, *Crawford v. Everson*, 68 N. Y. 624.

⁴ *Sup'm. Ct.* 1878, *Heilman v. Hammond*, 13 Hun, 474.

⁵ N. Y. Super. 1885, *Heim v. Link*, 52 Super. 547.

⁶ *Ct. App.* 1875, *Noyes v. Phillips*, 16 Abb. N. S. 400.

⁷ N. Y. Super. 1868, *Hatch v. Fogarty*, 30 Super. 488; *Com. Pl.* 1856, *Beach v. Gregory*, 3 Abb. 78.

⁸ *Sup'm. Ct.* 1867, *Strittmacher v. Salina Co.* 34 How. 74; *Ct. App.* 1869, *Marvin v. Inglis*, 39 How. 329.

⁹ *Code Civ. Proc.* § 1001; N. Y. Super. 1879, *Hathaway v. Russell*, 45 Super. 538.

¹⁰ *Code Civ. Proc.* § 1349; *Hathaway v. Russell*, 45 Super. 538.

¹¹ *Code Civ. Proc.* § 1346.

¹² *Code Civ. Proc.* § 997; *Rule* 32; *Sup'm. Ct.* 1878, *McLean v. Cole*, 13 Hun, 300; *Sup'm. Ct.* 1880, *Brown v. Grupp*, 10 Week. Dig. 357.

¹³ *Code Civ. Proc.* § 998.

¹⁴ 1880, *French v. Powers*, 80 N. Y. 146; *Gormerly v. McGlynn*, 84 N. Y. 284.

dence bearing on the facts intended to be reviewed, the exceptions taken during, as well as after the trial to the final decision, and the findings of facts and conclusions of law separately stated.¹ A case containing the evidence is essential where the facts are sought to be reviewed.² One not containing the evidence brings up only findings of fact and conclusions of law.³ It must state that it contains all the evidence, otherwise it will be presumed the findings are correct.⁴ If the appellant omits evidence, the respondent should supply it by amendment.⁵ The findings of fact must be incorporated, otherwise the appeal cannot be heard;⁶ and must agree with those in the report; otherwise those made on the settlement of the case will be disregarded.⁷ Where the party relies exclusively on erroneous decisions made during the trial, exceptions to the conclusions of law are not necessary;⁸ the exceptions must appear in the case otherwise questions of law cannot be raised.⁹ A case containing no exceptions, either to the final decision or to questions of law decided during the trial, cannot be reviewed on appeal,¹⁰ except to ascertain if the report is against the evidence.¹¹ Exceptions to rulings on requests to find made on the settlement of the case may be inserted,

¹ Code Civ. Proc. § 997; N. Y. Super. 1873, *Dainese v. Allen*, 14 Abb. N. S. 363; Ct. App. 1856, *Johnson v. Whitlock*, 12 How. 571.

² N. Y. Super. 1860, *Frost v. Smith*, 20 Super. 108.

³ N. Y. Super. 1860, *Frost v. Smith*, 20 Super. 108; Sup'm. Ct. 1858, *Conolly v. Conolly*, 16 How. 224.

⁴ Sup'm. Ct. *Griffiths v. Phelps*, 21 Week. Dig. 390; Sup'm. Ct. 1886, *Spence v. Chambers*, 39 Hun, 193.

⁵ 1871, *Tomlinson v. Mayor*, 44 N. Y. 601.

⁶ Sup'm. Ct. 1860, *Matthews v. Mayor*, 14 Abb. 209; 1864, *Bridger v. Weeks*, 30 N. Y. 328; 1865, *Le-*

land v. Cameron, 31 N. Y. 115; 1865, *Doty v. Carolus*, 31 N. Y. 547.

⁷ 1875, *Tompkins v. Lee*, 59 N. Y. 662; 1880, *Schwinger v. Raymond*, 83 N. Y. 192; Compare *Hamilton v. Proudfit*, 19 Super. 191.

⁸ N. Y. Super. 1873, *Dainese v. Allen*, 14 Abb. N. S. 363.

⁹ 1860, *Ingersoll v. Bostwick*, 22 N. Y. 425; 1856, *Magie v. Baker*, 14 N. Y. 435; 1858, *Otis v. Spencer*, 16 N. Y. 610.

¹⁰ N. Y. Super. 1873, *Dainese v. Allen*, 14 Abb. N. S. 363; Sup'm. Ct. 1861, *Tyler v. Willis*, 33 Barb. 327.

¹¹ Sup'm. Ct. 1877, *Mut. Gas Co. v. Mayor*, 9 Hun, 706.

unless objection be made at that time;¹ but if objection be made the referee has no power to insert exceptions not in fact taken.² The finding of facts made by the referee in his report cannot be changed, nor can exceptions not in fact taken be inserted,³ nor can any new findings be made on the settlement.⁴ If no findings are inserted the judgment will be presumed to be correct.⁵ If a motion was made for a non-suit, the case must show the ruling thereon and an exception thereto.⁶ The opinion of the referee, if any was given, must be inserted.⁷ The settlement is a judicial act and cannot be performed by two out of three referees without notice to all.⁸ If a party is dissatisfied with the case as settled, the remedy is by motion for a re-settlement.⁹ The remedy for refusal to settle is by mandamus, but before the referee can be compelled to settle it in a particular way it must be made to appear that such way is in accordance with the facts.¹⁰ The motion for re-settlement must be made at special term.¹¹ In settling the case the referee must correctly state what took place on the trial, and what he did as the result of such trial.¹² The case must be certified by the judge or referee who tried it.¹³

¹ 1882, *Ward v. Craig*, 87 N. Y. 550.

² N. Y. Super. 1873, *Dainese v. Allen*, 14 Abb. N. S. 363; 1873, *Carroll v. Staten Island Co.* 65 Barb. 32; 1856, *Johnson v. Whitlock*, 13 N. Y. 344; 1855, *Griscom v. Mayor*, 12 N. Y. 586; Sup'm. Ct. 1856, *Brown v. Irish*, 12 How. 481.

³ 1856, *Johnson v. Whitlock*, 13 N. Y. 344; 1855, *Griscom v. Mayor*, 12 N. Y. 586; Sup'm. Ct. 1867, *Voorhis v. Voorhis*, 50 Barb. 119.

⁴ Sup'm. Ct. 1880, *Palmer v. Phoenix Co.* 22 Hun, 224.

⁵ 1869, *Viele v. Troy Co.* 20 N. Y. 184.

⁶ 1877, *Vanderlip v. Keyser*, 68 N. Y. 443; Sup'm. Ct. 1866, *Pritchard v. Hert*, 39 Hun, 378.

⁷ Sup'm. Ct. 1861, *Warren v. Warren*, 22 How. 142.

⁸ N. Y. Super. 1871, *Townsend v.*

Glens Falls Co. 33 Super. 130; 10 Abb. N. S. 277; N. Y. Super. Chamb. 1862, *Fielden v. Lahens*, 14 Abb. 48.

⁹ Sup'm. Ct. 1867, *Leffler v. Field*, 33 How. 385; 47 N. Y. 407; 1871, *Van Slyck v. Hyatt*, 46 N. Y. 259.

¹⁰ Sup'm. Ct. Sp. T. 1861, *People v. Baker*, 35 Barb. 105; 14 Abb. 19.

¹¹ Sup'm. Ct. 1853, *Witbeck v. Waine*, 8 How. 433; Com. Pl. 1870, *Talcott v. Rosenberg*, 3 Daly, 203; 8 Abb. N. S. 287; Sup'm. Ct. Sp. T. 1487, *Luyster v. Sniffen*, 1 Barb. 428; 3 How. 250.

¹² Sup'm. Ct. 1867, *Voorhis v. Voorhis*, 50 Barb. 119.

¹³ Code Civ. Proc. § 1353.

Where the first report is set aside for defective findings, and another is made which warrants the judgment entered thereon, the last report only should be inserted.¹ The case should contain only such evidence, exceptions and findings as are expressly allowed by the referee.² A referee who has by assignment a first lien on the judgment for his fees is disqualified from settling the case; in such event the judgment will be reversed and a new trial ordered.³

§ 10. **Making and Settling a Bill of Exceptions.**—The making and settlement of a case is unnecessary where the appellant intends to rely only upon exceptions taken after the case is finally submitted.⁴ A bill of exceptions must contain only so much of the evidence as may be necessary to present the questions of law upon which the same were taken. All matter not necessarily inserted must be stricken out on the settlement;⁵ a bill containing an introductory statement of the proceedings in the cause, the notice of appeal, the judgment record, including the referee's report, and the exceptions filed thereto is sufficient;⁶ respondent's exceptions should not be included in the absence of special reasons therefor;⁷ nor should the bill contain questions withdrawn, answers excluded, nor testimony not necessary to raise the questions on the exceptions.⁸ The report will not be set aside on a bill of exceptions containing no evidence, unless such report contains facts which render such conclusions erroneous.⁹ Where the record contained only the judgment roll and

¹ Sup'm. Ct. 1881, *Lyddy v. Chamberlain*, 24 Hun, 377.

² Sup'm. Ct. 1867, *Leffler v. Field*, 33 How. 376.

³ 1883, *Leonard v. Mulry*, 93 N. Y. 392.

⁴ Code Civ. Proc. § 998.

⁵ Rule 34; Sup'm. Ct. 1874, *Tweed v. Davis*, 1 Hun, 252; Sup'm. Ct. 1876, *Marckwald v. Ocean Co.* 8 Hun, 547; 1850, *Price v. Powell*, 3 N. Y. 322.

⁶ Sup'm. Ct. 1873, *Davis v. Van Wie*, 1 T. & C. 530; Sup'm. Ct. 1862, *Ferguson v. Hamilton*, 35 Barb. 427; N. Y. Super. 1858, *Frost v. Smith*, 20 Super. 108.

⁷ N. Y. Super. 1870, *Dabney v. Stevens*, 10 Abb. N. S. 39.

⁸ N. Y. Super. 1863, *Hoffman v. Aetna Co.* 24 Super. 501; 19 Abb. 325.

⁹ 1871, *Tomlinson v. Mayor*, 44 N. Y. 601.

what purported to be a copy of a paper endorsed "minutes of the referee," which had never been settled or signed, the paper will not be considered by the court.¹ Time to serve a bill of exceptions runs from the time of service of notice of entry of judgment.² Extension of time to serve a bill of exceptions does not extend time to serve notice of appeal.³ Where more than one referee is appointed a majority may settle a case, but all must have notice of meeting.⁴ The exceptions need not be signed or sealed by the referee.⁵ Application for a re-settlement must be made to a justice at special term.⁶ If the exceptions are numerous, counsel must on the argument point out the ones on which he relies.⁷ It is not a valid objection to the bill that all the exceptions are contained in one sentence where it appears that each request was distinctly made and ruled upon, and each ruling excepted to.⁹

¹ Sup'm. Ct. 1880, *Albright v. Riker*, 22 Hun, 367; 11 Week. Dig. 27.

² 1880, *French v. Powers*, 80 N. Y. 146; Rule 32.

³ Sup'm. Ct. 1863, *Sales v. Butler* 27 How. 133.

⁴ Code Civ. Proc. § 1026; N. Y. Super. 1871, *Townsend v. Glens Falls Co.* 33 Super. 130; 10 Abb. N. S. 277.

⁵ 1854, *Zabriskie v. Smith*, 11 N. Y. 480.

⁶ Sup'm. Ct. 1853, *Witbeck v. Waite*, 8 How. 433; Com. Pl. 1870, *Talcott v. Rosenberg*, 3 Daly, 203; 8 Abb. N. S. 287; Sup'm. Ct. Sp. T. 1847, *Luyster v. Sniffen*, 1 Barb. 428; 3 How. 250; See *Adams v. Bush*, 2 Abb. N. S. 118.

⁷ 1877, *Hibbard v. Haughian*, 70 N. Y. 54; 1874, *Jewell v. Van Steenburgh*, 58 N. Y. 85.

⁸ 1854, *Dunckel v. Wiles*, 11 N. Y. 420.

PART II.

CHAPTER I.

INTERLOCUTORY REFERENCES GENERALLY.

SECTION 1.—When ordered.

SECTION 2.—The order; bringing on the hearing.

SECTION 3.—Proceedings on the hearing.

SECTION 4.—The report.

§ 1. When an Interlocutory Reference may be Ordered.—A reference ordered at any stage of an action or special proceeding for any purpose other than the trial of all the issues is interlocutory.¹ Such references are discretionary, and may be made with or without the consent of the parties;² but the court can order a reference for the trial of part of the issues against the will of either party only in action where a long account is involved.³ It has no authority to order a reference to take testimony to be used on the trial.⁴ Where, after trial of the issues an accounting is necessary, a referee may be appointed to take and state the account.⁵ A reference may be ordered in any case where, after the issues are tried, the court desires further information.⁶ After the trial of the issues in an action at law for

¹ 1868, *Morris v. Morange*, 38 N. Y. 172; Ct. App. 1867, *Clark v. Brooks*, 2 Abb. N. S. 385, 404; 1874, *Austin v. Ahearne*, 61 N. Y. 6; 1880, *Webb v. Buckalew*, 82 N. Y. 555.

² Code Civ. Proc. §§ 827, 1013, 1014, 1015.

³ Sup'm. Ct. 1878, *Barnes v. West*, 16 Hun, 68; Sup'm. Ct. 1880, *Dane v. Liverpool Co.* 21 Hun. 259.

⁴ Sup'm. Ct. 1887, *Farmers' Bank v. Houston*, 44 Hun, 567; Sup'm.

Ct. 1847, *Rathbun v. Rathbun*, 3 How. 139; Sup'm. Ct. Sp. T. 1847, *Stewart v. Gardner*, 3 How. 156; 1858, *Phillips v. Gorham*, 17 N. Y. 270.

⁵ 1881, *Camp v. Ingersoll*, 86 N. Y. 433; 1885, *Peck v. Vandemark*, 99 N. Y. 29.

⁶ Sup'm. Ct. Sp. T. 1886, *Central Trust Co. v. Northern R. R. Co.* 18 Abb. N. C. 64.

unliquidated damages, a referee may be appointed to ascertain the damages.¹ On application to the court to protect the lien of an attorney, the existence and amount thereof may be determined in a summary way by a reference.² Where the trial will involve a long account the reference may be had before or after the other issues have been tried;³ but in an action to open an account stated, and for an accounting, the reference should not be ordered until the action has been tried.⁴ A reference may be ordered to settle a judgment;⁵ to take the examination of the defendant in an action by a judgment creditor;⁶ to mark a case secured on appeal;⁷ to settle conflicting claims of defendants on inter-pleader;⁸ to superintend the execution of a judgment;⁹ to direct and superintend the discovery of books and papers;¹⁰ to take the deposition of a witness;¹¹ to settle issues to be tried by a jury;¹² to appoint a receiver and take security;¹³ to approve an undertaking or the sureties thereto; to appoint an appraiser, receiver or trustee; or to make an examination or inquiry;¹⁴ but the court cannot delegate to a referee the power to fix a proper allowance in difficult and extraordinary cases.¹⁵ In a foreclosure action where the mortgage covers several lots owned by different defendants, a reference may be had to ascertain the equities and report the order of sale.¹⁶ Where in the course of a trial it appears that one of the parties

¹ 1887, *Untermeyer v. Beinhauer*, 105 N. Y. 521.

² Com. Pl. 1862, *Ackerman v. Ackerman*, 14 Abb. 229; Sup'm. Ct. 1876, *Brown v. Mayor*, 9 Hun, 587; Sup'm. Ct. 1877, *Brown v. Mayor*, 11 Hun, 21.

³ N. Y. Super. 1852, *Bowman v. Sheldon*, 8 Super. 607.

⁴ Sup'm. Ct. Sp. T. 1867, *Mitchell v. Stewart*, 3 Abb. N. S. 250; Sup'm. Ct. Sp. T. 1852, *Graham v. Golding*, 7 How. 260.

⁵ Code Civ. Proc. § 1231.

⁶ Code Civ. Proc. § 1878.

⁷ Sup'm. Ct. Sp. T. 1856, *Munn v. Barnum*, 2 Abb. 409.

⁸ Chancery, 1831, *President v. Bangs*, 2 Paige, 570.

⁹ Com. Pl. Sp. T. 1882, *Lazarus v. Heilman*, 11 Abb. N. C. 93.

¹⁰ Code Civ. Proc. § 807.

¹¹ Code Civ. Proc. § 879.

¹² Rule 31.

¹³ Com. Pl. Sp. T. 1854, *Wetter v. Schlieper*, 7 Abb. 92; See *Eagle Iron Works*, 8 Paige, 380.

¹⁴ Code Civ. Proc. § 827.

¹⁵ Sup'm. Ct. 1871, *People v. Alb. & Susq. R. R. Co.* 5 Lans. 25.

¹⁶ Sup'm. Ct. 1847, *Bard v. Steele*, 3 How. 110.

will be entitled to redeem on payment of an amount not determined, a reference may be ordered before the findings are signed to ascertain the amount to be paid.¹ On application for a peremptory mandamus to compel a foreign corporation to exhibit its books, a reference may be ordered to ascertain the facts.² Where the special term in directing judgment has adopted an erroneous measure of damages, the general term may send the cause to a referee to ascertain the proper sum to be allowed.³

§ 2. **The Order and Bringing on the Hearing.**—Where the order or decree directing an interlocutory reference contains no provisions regulating the proceeding thereon, and the rules of court have made no provisions therefor, the hearing is brought on and conducted in accordance with the practice on similar references in the late court of chancery.⁴ Such reference is analogous to that to a master under the old chancery practice to enable the court to make a proper decree.⁵ The order or decree should distinctly state the object and scope of the proceeding. The referee has no power beyond that expressly given.⁶ He must possess the same qualifications, and be appointed in the same manner as on references for the trial of issues.⁷ But if the reference be one authorized to be made on *ex parte* application, the appointment may be made by a chamber order.⁸ He should take no steps until he has received a certified copy of the order appoint-

¹ Sup'm. Ct. Sp. T. 1886, *Central T. Co. v. Northern R. R. Co.*, 18 Abb. N. C. 64; *id.* 381; 42 Hun, 602.

² Sup'm. Ct. 1887, *People v. St. Louis Co.* 44 Hun, 552.

³ N. Y. Super. 1867, *McKeon v. See*, 27 Super. 449.

⁴ Rule 85: 1851, *Wiggin v. Gans*, 6 Super. 646; Sup'm. Ct. Sp. T. 1858, *Elmore v. Thomas*, 7 Abb. 70; Sup'm. Ct. 1856, *Ketchum v. Clark*, 22 Barb. 319; 1864, *Austin v. Ahearne*, 61 N. Y. 6.

⁵ Sup'm. Ct. 1859, *Cameron v. Freeman*, 18 How. 310; Sup'm. Ct. Sp. T. 1862, *Graham v. Golding*, 7 How. 260; Sup'm. Ct. 1856, *Palmer v. Palmer*, 13 How. 363; 1874, *Austin v. Ahearns*, 61 N. Y. 6.

⁶ N. Y. Super. Sp. T. 1877, *Sullivan v. Sullivan*, 41 Super. 519; 52 How. 453; 1853, *McCracken v. Valentine*, 9 N. Y. 42; N. Y. Super. 1864, *Ballard v. Burrowes*, 25 Super. 206.

⁷ Code Civ. Proc. § 1024; Rule 80.

⁸ Code Civ. Proc. §§ 873, 885.

ing him.¹ The party obtaining has the carriage of the reference;² should he fail to proceed with due diligence the opposing party may, on application, have leave to proceed.³ If the time and place of hearing be not fixed by the order or decree, the referee should fix a time and place of hearing; should issue and deliver to the party having the carriage of the reference, for service on the adverse parties or their attorneys, a summons or notice to attend at the time and place fixed.⁴ It has been held that it is not strictly necessary that the notice of time and place should be in

¹ "Where a matter is referred to a master, to examine and report thereon, on bringing the decree or order into his office he shall assign a day and place for hearing the parties, and give to the party bringing in such decree, or order, a summons for the adverse party to attend at the day and place so appointed. The summons shall be served on the adverse party or his solicitor, such time, previous to the day appointed for hearing, as the master may deem reasonable and direct; taking into consideration the nature of the matters to be examined, and the residence of the parties. But the time of service, unless otherwise ordered by the court, shall not be less than two days, where the solicitor of the adverse party resides in the city or town where the hearing is to take place, and not less than four days where he resides elsewhere not exceeding fifty miles from the place of hearing, nor less than six days if over fifty and not exceeding one hundred miles; and not less than eight days where he resides more than one hundred miles from the place of hearing." Chancery Rule 100.

"If the party who is entitled to prosecute such decree, or order of reference, does not procure and serve

such summons within thirty days after the decree or order is entered, any other party or person interested in the matter of the reference shall be at liberty to apply to the court, by motion or petition, to expedite the prosecution of the decree or order. And after the proceedings have been commenced by the service of a summons to attend before the master, if the party entitled to prosecute such decree or order does not proceed with due diligence, the master shall be at liberty, upon the application of any other person interested, either as a party to the suit or as coming in to prove his debt or establish a claim under the decree or order, to commit to him the prosecution of the reference." Chancery Rule 101.

Chancery, 1843, *Quackenbush v. Leonard*, 10 Paige, 131; Sup'm. Ct. 1860, *Bonner v. McPhail*, 31 Barb. 106.

² Chancery, 1843, *Quackenbush v. Leonard*, 10 Paige, 131; Chancery, 1841, *Holley v. Glover*, 9 Paige, 9; Chancery Rule 101, *supra*.

³ Chancery Rule 101; *supra*; Chancery, 1843, *Quackenbush v. Leonard*, 10 Paige, 131; Chancery, 1841, *Holley v. Glover*, 9 Paige, 9.

⁴ Chanc. ry Rule 100; *supra*.

writing, though it is better so.¹ Unless otherwise directed by the order the summons or notice to attend should be served two days before the time fixed, on parties or their attorneys residing in the same town or city, four days where they live not more than sixty miles distant, and a proportionate time for longer distances.² The court may order the hearing to proceed on two days' notice, but the referee may exercise his discretion as to adjournments.³ The order of reference is appealable;⁴ but proceeding without objection waives the right.⁵ Appearing before a referee named in an interlocutory decree and presenting claims on the accounting does not waive the right to appeal from the decree.⁶ Where the trial of the issues has terminated, and the court orders a reference for further information, the order should provide that such reference is without prejudice to the consideration of any questions arising on the trial whenever any legal action shall be taken for their review, in the subsequent progress of the litigation.⁷

§ 3. **Proceedings on the Hearing.**—Before taking any testimony the referee must be sworn,⁸ but proceeding with the reference is a waiver of this irregularity unless one of the parties is under disability, or the adverse party fails to appear.⁹ Where persons under disabilities are parties, the proceedings will be set aside if the oath is not taken,¹⁰ but a referee to compute in foreclosure need not take the oath.¹¹ The proceedings may be adjourned from time to time by the referee,¹² but for an unreasonable adjournment he may

¹ Sup'm. Ct. Sp. T. 1859, *Sage v. Mosher*, 17 How. 367; Sup'm. Ct. Sp. T. 1853, *Stephens v. Strong*, 8 How. 339.

² Chancery Rule 100; *ante* P. 85.

³ Sup'm. Ct. 1886, *Stubbs v. Ripley*, 39 Hun, 620.

⁴ Sup'm. Ct. 1886, *Central T. Co. v. N. Y. & N. Co.* 42 Hun, 602.

⁵ *Ante* P. 31.

⁶ 1874, *Barker v. White*, 58 N.Y. 204.

⁷ Sup'm. Ct. 1886, *Central Trust Co. v. N. Y. & N.R.R. Co.* 42 Hun, 602.

⁸ Code Civ. Proc. § 1016.

⁹ Com. Pl. 1878, *Nason v. Ludington*, 56 How. 172; Sup'm. Ct. 1848, *Garcie v. Sheldon*, 3 Barb. 232; Code Civ. Proc. § 721, par. 12.

¹⁰ Com. Pl., Sp. T. 1878, *Exchange Co. v. Early*, 4 Abb. N. C. 78.

¹¹ N. Y. Super. Sp. T. 1878, *McGowan v. Newman*, 4 Abb. N. C. 80.

¹² N. Y. Super. Sp. T. 1859, *Forrest v. Forrest*, 16 Super. 651; N. Y. Super. Sp. T. 1859, *Accessory Co. v. Garrison*, 9 Abb. 141; 18 How. 1; Sup'm. Ct. 1886, *Stubbs v. Ripley*, 39 Hun, 620.

be removed.¹ That formal adjournments were not had from time to time does not affect the regularity of the proceedings if both parties gave all the evidence they desired.² Witnesses may be subpoenaed to attend and produce books, documents, and papers.³ If the order of reference was made in an action the subpoena must be issued out of court and served as prescribed by the code of civil procedure.⁴ Disobedience may be punished by proceedings for contempt, and by a fine.⁵ If the reference was ordered in a special proceeding the subpoena must be issued by and under the hand of the referee.⁶ Attendance may be compelled by proceedings for contempt before the court,⁷ or by attachment upon the order of a judge if the reference is in a special proceeding.⁸ The procedure to punish for contempt by the court in interlocutory references in an action is the same as on a trial of the issues.⁹ If, in a special proceeding, the witness refuses, without reasonable cause, to be examined, or to answer a legal and pertinent question, or to subscribe his deposition after it has been correctly reduced to writing, he may be punished by imprisonment.¹⁰ The code contains no provisions authorizing the referee in interlocutory references to punish for contempt. The authority conferred by section 1018 applies only to references for the trial of issues. The testimony of the witnesses must be signed by them, and filed by the referee with his report.¹¹ The remedy for failure to sign is by motion, not by excepting to the report;¹² failure to request a witness to sign is not a waiver of the signature.¹³ On a reference to inquire and report the referee has no power to strike out evidence of a party who fails to appear for cross-examination, or

¹ N. Y. Super. Sp. T. 1859, *Forest v. Forest*, 16 Super. 651.

² N. Y. Super. 1859, *Accessory Co. v. Garrison*, 9 Abb. 141; 18 How. 1.

³ Code Civ. Proc. § 1017.

⁴ Code Civ. Proc. § 852.

⁵ Code Civ. Proc. §§ 14, 853.

⁶ Code Civ. Proc. § 854; Sup'm. Ct. 1885, *People v. Ball*, 37 Hun, 245.

⁷ Sup'm Ct. 1881, *Matter of Crooks*, 23 Hun, 696.

⁸ Code Civ. Proc. § 855.

⁹ Sup'm. Ct. 1881, *Matter of Crooks*, 23 Hun, 696.

¹⁰ Code Civ. Proc. § 856.

¹¹ Rule 30.

¹² Sup'm. Ct. Sp. T. 1873, *Nat. Bank v. Hibbard*, 45 How. 281.

¹³ Sup'm Ct. Sp. T. 1880, *Bowne v. Leveridge*, 8 Abb. N. C. 148 n.

to punish for non-attendance.¹ A referee appointed to take the evidence is not bound to take irrelevant testimony.² In taking depositions *de bene esse*, while the referee is bound to take all the answers, leaving the question of competency or relevancy to the court, he is not bound to allow irrelevant or improper questions.³

§ 4. **Report on Interlocutory References.**—Neither the code nor the rules of the court prescribe the form of the report of a referee on interlocutory references. When a specific question is referred, his office is similar to that of a master in chancery, and the former practice of that court applies.⁴ The report should contain the title of the cause, should be addressed to the court, must show that all persons entitled to attend were duly summoned, who appeared, should recite the substance, but not a copy of the order, and an epitome of the proceedings before him.⁵ In all cases the testimony must be signed by the witnesses and returned to court with the report.⁶ If the reference is to take an account, or for a similar purpose, the report will consist of two parts, the body and the schedules; the body containing the general conclusions, and referring to the schedules for detailed particulars.⁷ Items objected to but allowed in an account must be distinctly stated.⁸ Where the court has ordered judgment absolute for the plaintiff with costs, and directed a reference to ascertain the amount due, the referee cannot report a sum due defendant for which he is entitled to judgment, and defeat plaintiff's right to costs.⁹ Where the order or decree directs just allowances to be

¹ Sup'm. Ct. 1881, *Matter of* 1844, *Franklin v. Van Cott*, 11 Paige, Crooks, 23 Hun, 696. 129; Chancery, 1841, *Hulbert v. Mc-*

² Sup'm. Ct. 1887, *Matter of Sil-* Kay, 8 Paige, 651.
vernail, 45 Hun, 575.

³ Com. Pl. 1850, *Gibson v. Pear-*
sall; 1. E. D. S. 20.

⁴ Rule 85; Sup'm. Ct. 1856, *Ketch-*
um v. Clark, 22 Barb. 319; *Matter*
of Leffingwell, 30 Hun, 528, Sup'm.
Ct. Sp. T. 1850, *Graves v. Blanch-*
ard, 4 How. 300.

⁵ 1 Barb. Ch. Pr. p. [548], Chancery,

⁶ Rule 30.

⁷ 1 Barb. Ch. Pr. p. [548].

⁸ Sup'm. Ct. 1856, *Ketchum v.*
Clark, 22 Barb. 319; Sup'm. Ct.
1874, *Spooner v. Lefevre*, 2 T. & C.
666.

⁹ N. Y. Super. 1880, *Rust v. Hau-*
selt, 46 Super. 38.

made, all proper expenses of the trust, or business, as agents, clerks, counsel, etc. where necessary, may be allowed,¹ but a trustee cannot be allowed for his services as attorney and counsel in matters relating to his trust.² What are just allowances must be determined by the circumstances of each case. Such interest as shall be just and equitable is to be allowed, unless the contrary is directed in the order,³ annual rests and compound interest cannot be charged unless expressly so directed,⁴ but where in taking the account the referee is acting as a court for the trial of the issues, he may allow compound interest in cases of gross mismanagement.⁵ When the order is to ascertain the facts, the report should contain only the facts found; it is for the court, or judge, to draw conclusions.⁶ In such case the report should contain the facts, not the evidence at large.⁷ Where the referee is directed to report with his opinion he should state fully the facts upon which the opinion is based.⁸ He is not bound to deliver his report until his

¹ 1869, *Collier v. Munn*, 41 N. Y. 143; *Chancery*, 1814, *Green v. Winter*, 1 J. Ch. 26; *Chancery*, 1823, *McWhortie v. Remsen*, *Hopk.* 28; *Chancery*, 1830, *Vanderheyden v. Vanderheyden*, 2 *Paige*. 287; *Sup'm. Ct.* 1882, *Clute v. Gould*, 28 *Hun*, 348; *Sup'm. Ct.* 1865, *Lansing v. Lansing*, 45 *Barb.* 182; 31 *How*, 55.

² 1869, *Collier v. Munn*, 41 N. Y. 143; *Chancery*; 1836, *Matter of Bank of Niagara*, 6 *Paige*, 213.

³ "All parties accounting before a master shall bring in their accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the accounts so brought in shall be at liberty to examine the accounting party upon interrogatories, as the master may direct. On any reference to take or state an account, the master shall be at liberty to allow interest

as shall be just and equitable, without any special directions for that purpose, unless a contrary direction is contained in the order of reference. And every charge, discharge, or state of facts, brought in before a master shall be verified by oath as true, either positively, or upon information and belief." *Chancery Rule*, 107.

⁴ 1869, *King v. Talbot*, 40 N. Y. 76.

⁵ 1877, *Hannahs v. Hannahs*, 68 N. Y. 610.

⁶ 1874, *Austin v. Ahearne*, 61 N. Y. 6; *Sup'm. Ct.* 1859, *Goodridge v. New*, 18 *How.* 189; *Sup'm. Ct. Chamb.* 1887, *Kelly v. Charlier*, 18 *Abb. N. C.* 416.

⁷ *Sup'm. Ct. Chamb.* 1850, *Dow v. Noxon*, 5 *How.* 29.

⁸ *Sup'm. Ct. Sp. T.* 1856, *Matter of Marsac*, 15 *How.* 383; 1874, *Austin v. Ahearne*, 61 N. Y. 6.

fees are paid,¹ but if they are not paid within sixty days after the matter is finally submitted the reference may be terminated by notice by either party before the report is made.² Where exceptions to the report are necessary they must be filed within eight days after filing the report and notice thereof, otherwise the report will become absolute though defective on its face.³ The time to except does not begin to run until the testimony is filed.⁴ Leave to file exceptions now for then may be granted.⁵ If the reference was ordered before judgment, to enable the court to make a proper decree, it must be confirmed at special term for enumerated motions;⁶ if after judgment, or to take proof on default at special term for non-enumerated motions.⁷ The report is not binding on the court.⁸ The clause of rule 30 requiring exceptions to be filed within eight days has no application to a reference ordered to inform the conscience of the court.⁹ A referee appointed to ascertain who hold liens on a fund has no power to accept any waiver of the rights of a general assignee. He can report upon those judgments that are a lien on the fund.¹⁰ Where the general term modifies the judgment entered on the referee's report, and sends the case back for a further finding on a single point, the new report must be confirmed at special, not general, term.¹¹ On a reference to inquire and report, the referee has no authority to report on a

¹ 1880, *Geib v. Topping*, 83 N. Y. 46; *Com. Pl. 1879, Fischer v. Raab*, 58 How. 221.

² Code Civ. Proc. § 1019.

³ Rule 30; *Sup'm. Ct. 1874, Catlin v. Catlin*, 2 Hun. 378; *Sup'm. Ct. Sp. T. 1884, Gade v. Gade*, 14 Abb. N. C. 510.

⁴ *Sup'm. Ct. 1880, Pope v. Perault*, 22 Hun, 468.

⁵ *Sup'm. Ct. Sp. T. 1884, Gade v. Gade*, 14 Abb. N. C. 510; *N. Y. Super. 1880, Rust v. Hauselt*, 46 Super. 22; *Sup'm. Ct. 1876, Douglas v. Douglas*, 7 Hun, 272.

⁶ *Sup'm. Ct. 1876, Empire, &c. Co. v. Stevens*, 8 Hun, 515.

⁷ Rule 30; *Sup'm. Ct. Sp. T. 1884, Gade v. Gade*, 14 Abb. N. C. 510; *Sup'm. Ct. 1876, Matter of Guardian Sav. Ins.* 9 Hun, 267.

⁸ *Sup'm. Ct. 1875, Thurber v. Chambers*, 4 Hun, 721; 1874, *Austin v. Ahearne*, 61 N. Y. 6.

⁹ *Sup'm. Ct. 1887, Martin v. Hodges*, 45 Hun, 38; *Sup'm. Ct. Sp. T. 1882, Atty.-Gen. v. Continental L. I. Co.* 64 How, 93.

¹⁰ *N. Y. Super. 1864, Ballard v. Burrowes*, 25 Super. 206.

¹¹ *Sup'm. Ct. 1886, Gautier v. Douglas Co.* 39 Hun, 642.

question of law arising thereon.¹ Where he is directed to report with his opinion, his conclusions are not binding on the court,² nor is the finding of fact on such reference conclusive.³ If the findings of fact are erroneous, the case may be sent back;⁴ if the witnesses have failed to sign their testimony, the report may be set aside.⁵ The report may be reviewed on the motion to confirm after objections are filed,⁶ or before, or after judgment upon proof by affidavit that error was committed to the prejudice of the moving party upon the hearing, or in the report. If made after judgment, such judgment may be set aside then, or after the new hearing.⁷ Where applications for the appointment of a receiver were pending in two suits, in one of which a referee, without notice to the parties, had made an appointment, the reference was opened to allow the adverse party to be heard as to the fitness of the person appointed.⁸ If a party fails to except to the report within eight days it becomes absolute, though defective on its face.⁹ Where, instead of filing the report and giving the usual notice the parties are cited summarily to show cause why the report should not be confirmed, an objection to the confirmation takes the place of objections filed.¹⁰ The finding of the referee on a disputed question of fact is not conclusive on the court, but may be reviewed with other questions, on appeal.¹¹

¹ Sup'm. Ct. 1887, *Kelly v. Charlier*, 18 Abb. N. C. 416.

² Sup'm. Ct. 1886, *Muhlenbach v. Pooler*, N. Y. St. Rep. 223; 1874, *Austin v. Ahearne*, 61 N. Y. 6.

³ 1874, *Austin v. Ahearne*, 61 N. Y. 6. Sup'm. Ct. 1880, *Matter of Knapp*, 8 Abb. N. C. 308; 1882, *Savage v. Sherman*, 87 N. Y. 277; Sup'm. Ct. 1883, *Matthews v. Murchison*, 14 Abb. N. C. 512 n; N. Y. Surr. 1882, *Chatfield v. Hewlett*, 2 Dem. 191.

⁴ 1874, *Austin v. Ahearne*, 61 N. Y. 6.

⁵ Sup'm. Ct. Sp. T. 1880, *Bowne v. Leveridge*, 8 Abb. N. C. 148 n.

⁶ Rule 30.

⁷ Code Civ. Proc. § 1232.

⁸ Com. Pl. 1855, *Lottimer v. Lord*, 4 E. D. S. 183.

⁹ Sup'm. Ct. 1874, *Catlin v. Catlin*, 2 Hun, 378.

¹⁰ 1882, *Savage v. Sherman*, 87 N. Y. 277.

¹¹ Sup'm. Ct. 1849; *Burhans v. Van Zandt*, 7 Barb. 91.

CHAPTER II.

INTERLOCUTORY REFERENCES IN PARTICULAR CASES.

SECTION 1.—Compulsory reference of part of issues.

SECTION 2.—Compulsory reference of incidental questions.

SECTION 3.—Reference for the information of the court.

SECTION 4.—Reference to take and state an account.

SECTION 5.—Reference to take deposition to be used on motion.

SECTION 6.—Reference of question of fact arising on motion.

SECTION 7.—Reference to examine party before trial.

SECTION 8.—Reference to take proof on application for judgment by default.

SECTION 9.—Reference to sell chattels on the foreclosure of a lien thereon.

§ 1. **Compulsory Reference of Part of Issues.**—In an action triable by the court without a jury a reference may be ordered to decide the whole issue or any of the issues, or to report the referee's finding upon one or more specific questions of fact involved in the issue;¹ but it is only in actions involving a long account, not requiring the decision of difficult questions of law, that such references may be compulsorily directed.² The only effect of this provision is to authorize the court to appoint a referee to decide some of the issues less than the whole, or to report findings upon one or more specific questions of fact.³ It does not deprive either party of the right to trial by the court of matters not before the referee.⁴ It may be ordered to ascertain the amount due an attorney for services, provided he shall finally establish his right to recover.⁵ In an action for partition the court

¹ Code Civ. Proc. § 1013.

² Sup'm. Ct. 1878, *Barnes v. West*, 16 Hun, 68; Sup'm. Ct. 1880, *Dane v. Lond. Liv., &c., Co.* 21 Hun, 259.

³ Sup'm. Ct. 1880, *Dane v. Lond. Liv., &c., Co.* 21 Hun, 259.

⁴ N. Y. Super. 1867, *Wheeler v. Falconer*, 30 Super. 45.

⁵ N. Y. Super. Chamb. 1852, *Bowman v. Sheldon*, 8 Super, 607.

may order a reference to ascertain whether plaintiff has a lien, and the amount thereof, on the premises sought to be partitioned.¹

§ 2. **Compulsory Reference of Incidental Questions.**—The court may of its own motion, or upon application of either party, without consent of the other, direct a reference to take an account and report thereon after judgment, or where necessary for its own information; and also determine and report upon any question of fact, arising upon a motion, or otherwise except upon the pleadings.² Where, after dissolution of a partnership by death, the surviving partner has continued the business with the assets of the deceased partner, a reference may be ordered to ascertain the amount due the estate of the deceased from the firm.³ Where the complaint prays for an accounting and payment of the balance found due, and defendant fails to appear, a reference will be ordered to take the account.⁴ In action to dissolve a partnership, which is denied, and for an accounting, a reference to take the account cannot be ordered until the question of partnership is decided;⁵ so in an action in equity to compel the specific performance of an award requiring defendants to pay the value of shares of stock of a manufacturing corporation, a reference may be ordered to take an account of the assets, property, and debts of a corporation for the purpose of ascertaining such value;⁶ so in an action by an attorney for fees for professional services, a reference may be ordered to ascertain the value;⁷ or in an action to dissolve a joint stock company, and for an accounting to ascertain the rights of the parties as against each other.⁸

¹ Sup'm. Ct. 1875, *Thurber v. Chambers*, 4 Hun, 721.

² Code Civ. Proc. § 1015.

³ Com. Pl. Sp. T. 1878, *Hooley v. Gieve*, 9 Abb. N. C. 8.

⁴ N. Y. Super. Chamb. 1855, *Porter v. Lent*, 2 Abb. 115; N. Y. Super. Chamb. 1848, *Ryan v. McConnell*, 3 Super. 709.

⁵ Sup'm. Ct. Sp. T. 1853, *Bantes v. Brady*, 8 How. 216.

⁶ 1881, *Camp v. Ingersoll*, 86 N. Y. 433.

⁷ N. Y. Super. 1852, *Bowman v. Sheldon*, 8 Super. 607.

⁸ Sup'm. Ct. 1856, *Ketchum v. Clark*, 22 Barb. 319.

§ 3. **Reference for the Information of the Court.**—A reference may be ordered to ascertain who is entitled to surplus moneys on foreclosure by advertisement;¹ or to take proofs and report the terms upon which a judgment was settled, on a motion to vacate such settlement.² Any specific question in an action may be referred where the taking of a long account is necessary,³ before, or during the trial;⁴ to ascertain whether it would be for the interest of an infant to begin an action for partition; but in such case the referee in his report should find facts; his opinion is insufficient.⁵ On a motion to compel a purchaser on sale in partition to take title, a reference may be ordered to ascertain if the testator who died within three years left any debts outstanding.⁶ Where, after sale under foreclosure a surplus remains, and there are no contesting creditors, a reference may be ordered to ascertain the amount of other debts due from the mortgagor to the mortgagee that should be paid out of the fund.⁷ Such reference may be ordered to ascertain the validity and amount of claims against an estate in the hands of receivers;⁸ or to ascertain whether it would be for the benefit of an infant to begin an action for partition.⁹

§ 4. **Reference to Take and State an Account.**—A reference to take and state an account is brought on and the proceedings thereon are conformed to the practice formerly existing in the court of chancery.¹⁰ Where an interlocutory

¹ Code Civ. Proc. § 1015; 1859, Kirby v. Fitzpatrick, 18 N. Y. 484.

² Sup'm. Ct. 1859, Goodridge v. New, 18 How. 189.

³ N. Y. Super. Chamb. 1852, Bowman v. Sheldon, 8 Super. 607; Sup'm. Ct. Sp. T. 1854, Van Zandt v. Cobb, 10 How. 348; N. Y. Super. 1867, Wheeler v. Falconer, 30 Super. 45.

⁴ Sup'm. Ct. Sp. T. 1859, Cameron v. Freeman, 10 Abb. 333.

⁵ Sup'm. Ct. Sp. T. 1856, Matter of Marsac, 15 How. 383.

⁶ Sup'm. Ct. Sp. T. 1857, Disbrow v. Folger, 5 Abb. 53.

⁷ Sup'm. Ct. Sp. T. 1859, Beek-

man Co. v. First M. E. Church, 29 Barb. 658; 18 How. 431.

⁸ Sup'm. Ct. 1887, People v. Remington, 45 Hun, 347; Chancery, 1836, Matter of Receivers of Globe Co. 6 Paige, 102; Chancery, 1836, Holbrook v. Receivers, 6 Paige, 220, Sup'm. Ct. 1873, Matter of Guardian Sav. Ins. v. Bowling Green Bank, 65 Barb. 275.

⁹ Sup'm. Ct. Sp. T. 1856, Matter of Marsac, 15 How. 383.

¹⁰ Rule 85; Sup'm. Ct. 1874, Mundorf v. Mundorf, 1 Hun, 41; N. Y. Super. 1880, Hathaway v. Russell, 46 Super 103.

• • decree directs a reference, or one is ordered by the court, the party obtaining the appointment is entitled to the carriage of the proceedings;¹ should he fail to proceed with due diligence the adverse party may move on affidavit and notice before the referee to have the further prosecution of the cause committed to him.² The referee should in writing fix a time and place of hearing and notice of the object of attendance, and deliver it to the party obtaining the order, for service on the adverse parties,³ but should not give such notice until the decree has been signed, or order entered, and a certified copy served on him.⁴ Where the length of notice is not stated in the order or decree at least two days' notice should be given to resident parties, and a longer time where they reside at a distance.⁵ Under the present practice it has been held not strictly necessary that the notice by the referee should be in writing, though it is better so.⁶ The referee must be sworn.⁷ The accounting must proceed on the basis directed in the order;⁸ if specific directions are not therein given, or if it be ordered that it proceed in the usual way, the procedure will be the same as in the late court of chancery.⁹ The prosecuting party has the right, if he insists, to have the account brought in in the form of debit and credit,¹⁰ and to examine the account-

¹ Chancery, 1843, *Quackenbush v. Leonard*, 10 Paige, 131; Chancery, 1841, *Holley v. Glover*, 9 Paige, 9.

² Chancery, 1843, *Quackenbush v. Leonard*, 10 Paige, 131; Chancery, 1841, *Holley v. Glover*, 9 Paige, 9; Chancery Rule 101; *ante* P. 85.

³ Chancery Rule 100; *ante* P. 85; Chancery, 1833, *Manhattan Co. v. Evertson*, 4 Paige, 276.

⁴ Chancery, 1843, *Quackenbush v. Leonard*, 10 Paige, 131.

⁵ Chancery Rule 100; *ante* P. 85.

⁶ Sup'm. Ct. Sp. T. 1859, *Sage v. Mosher*, 17 How. 367; Sup'm. Ct. Sp. T. 1853, *Stephens v. Strong*, 8 How. 339.

⁷ Code Civ. Proc. § 1016.

⁸ N. Y. Super. 1879, *Hathaway v. Russell*, 45 Super. 538; 1853, *McCracken v. Valentine*, 9 N. Y. 42.

⁹ N. Y. Super. 1851, *Wiggin v. Gans*, 6 Super. 646; Sup'm. Ct. 1874, *Mundorf v. Mundorf*, 1 Hun, 41; Sup'm. Ct. 1856, *Palmer v. Palmer*, 13 How. 363; Sup'm. Ct. Chamb. 1853, *Brevoort v. Warren*, 8 How. 321; N. Y. Super. 1880, *Hathaway v. Russell*, 46 Super. 103.

¹⁰ Chancery Rule 107, *ante* P. 89; N. Y. Super. 1851, *Wiggin v. Gans*, 6 Super. 646; Sup'm. Ct. 1856, *Palmer v. Palmer*, 13 How. 363; N. Y. Super. 1879, *Hathaway v. Russell*, 45 Super. 538; Sup'm. Ct. 1856, *Ketchum v. Clark*, 22 Barb. 319.

ing party on interrogatories, written or otherwise.¹ On the first hearing the referee should regulate the manner of taking the account, and may from time to time give such further directions as the case requires.² Where each of the parties has charges against the other he may require each to present his account, verified by oath, according to the best of his information and belief, and that he does not know of any error or omission therein to the prejudice of any of the other parties in the cause.³ The account must be stated for the period named, or to the time of the hearing.⁴ Where on being required to render an account the accounting party answers he is unable to do so because all the books and papers relating to the matter are in the hands of the adverse party, the referee is bound to take proof of the facts;⁵ he may order the production of books and papers,⁶ and direct that they be deposited with him for inspection;⁷ but the party producing may seal up

¹ Chancery Rule 107; *ante* P. 89; Chancery, 1833, Story *v.* Brown, 4 Page, 112; Chancery, 1817, Remsen *v.* Remsen, 2 J. Ch. 495.

² "At the time and place appointed in the summons for the hearing of the parties, the master shall proceed to regulate, as far as may be, the manner of its execution; as, for example, to state what parties are entitled to attend future proceedings, to direct the necessary advertisements, and to point out which of the several proceedings may properly be going on *pari passu*; and as to what particular matters interrogatories for the examination of the parties appear to be necessary; and whether the matters requiring evidence shall be proved by affidavit or by examination of witnesses; and in the latter case, if necessary, to issue his certificate for a commission; and if the master shall think it expedient so to do, he may then or upon subsequent attendance, and from time to time as circumstances may re-

quire, fix the time within or at which any proceedings before him shall be had; and he may proceed *de die in diem*, or by adjournment from time to time, as he may think proper." Chancery Rule 102; Chancery, 1833, Story *v.* Brown, 4 Paige, 112; Sup'm. Ct. 1856, Palmer *v.* Palmer, 13 How. 363.

³ Chancery Rule 107; *ante* P. 89; Chancery, 1833, Story *v.* Brown, 4 Paige, 112; N. Y. Super. 1851, Wiggin *v.* Gans, 6 Super. 646.

⁴ 1874, Darling *v.* Brewster, 55 N. Y. 667; N. Y. Super. 1860, Crosbie *v.* Leary, 19 Super. 312.

⁵ N. Y. Super. 1863, McCartan *v.* Van Syckel, 23 Super. 694.

⁶ Code Civ. Proc. § 1017; N. Y. Super. Sp. T. 1867, North *v.* Platt, 30 Super. 207; N. Y. Super. 1863, McCartan *v.* Van Syckel, 23 Super. 694; N. Y. Super. 1851, Frazee *v.* Phelps, 6 Super. 682.

⁷ "Where, by any decree or order of the court, books, papers or writings are directed to be produced be-

the parts that in no way relate to the subject of the examination;¹ it is a contempt of court for the adverse party to open the parts so sealed.² The oath of the party that the portion sealed in no way relates to the subject of inquiry is sufficient in the first instance. If the adverse party shows any fair grounds for supposing such part contains evidence which is material, he may, on application to the referee, require it to be opened.³ The party producing the books may be examined to ascertain if all are brought in,⁴ and may be compelled to permit a witness to examine them for the purpose of testifying therefrom.⁵ The referee may also require the adverse parties' exhibit in writing their objections to the accounts so filed, and preclude them from going beyond these unless they shall furnish some reasonable excuse for their delay or neglect.⁶ Where some, but not all the parties appear, the reference may proceed, and the proceedings can be reviewed by those in default only on special application to the referee, and the payment of such cost as he may impose.⁷ Refusal to obey an order of the

fore the master for the purposes of such decree or order, it shall be in the discretion of the master to determine what books, papers or writings are to be produced, and when and for how long they are to be left in his office; or, in case he shall not deem it necessary that they should be left or deposited in his office, then he may give directions for the inspection thereof by the parties requiring the same, at such time and in such manner as he shall deem expedient." Chancery Rule 103; Chancery, 1836, Kelly v. Eckford, 5 Paige, 548.

¹ Sup'm. Ct. 1847, Titus v. Cortelyou, 1 Barb. 444; Sup'm. Ct. Chamb. 1853, Brevoort v. Warner, 8 How. 321; Chancery, 1831, Dias v. Merle, 2 Paige, 494.

² Chancery, 1831, Dias v. Merle, 2 Paige, 494.

³ Sup'm. Ct. 1847, Titus v. Cortelyou, 1 Barb. 444.

⁴ Sup'm. Ct. Sp. T. 1857, Bradstreet v. Bailey, 4 Abb. 233; Sup'm. Ct. Sp. T. 1856, Ahoyke v. Wolcott 4 Abb. 41.

⁵ Ct. App. 1869, Sudlow v. Knox, 7 Abb. N. S. 411.

⁶ Chancery Rule 102, ante P. 85; Chancery, 1817, Remsen v. Remsen, 2 J. Ch. 495; Chancery, 1833, Story v. Brown, 4 Paige, 112.

⁷ "Where some, or one, but not all of the parties do attend the master at the time and place appointed, whether the same is fixed by the master personally or upon a summons or warrant, the master shall be at liberty to proceed *ex parte*, if he thinks it expedient so to do, considering the nature of the case; and if he has proceeded *ex parte*, such proceeding shall not in any manner be reviewed by him, unless, upon a special application to him for that purpose, by the party who was absent, the master shall be satisfied

referee duly made is a contempt of court;¹ but the referee has no authority to punish therefor.² Under the old practice the accounting party could be examined upon written interrogations or orally;³ but since parties have been allowed to testify in their own behalf the practice of examining on written interrogations has fallen into disuse, and may be regarded as no longer applicable. The account duly verified is *prima facie* evidence in favor of the accounting party.⁴ Upon his examination in support thereof he should produce receipts or other vouchers for all payments made;⁵ but when it is of long standing he may be allowed to prove his payments by his oath, when vouchers have been lost.⁶ In the surrogate's court no voucher is required from an executor or administrator for sums under twenty dollars, provided the payment is supported by the uncontradicted oath of the accounting party, and the total amount so expended does not exceed five hundred dollars;⁷ so if he proves by his own, or another's testimony, that he did not take a voucher, or if taken it is lost or destroyed, he may be allowed any item the payment of which is satisfactorily proved by the one to whom payment is made, or if he is dead, by any competent evidence other than his own;⁸

such party was not guilty of willful delay or negligence, and then only upon payment of all costs occasioned by his non-attendance; such costs to be certified by the master at the time, and paid by the party or his solicitor before he shall be permitted to proceed on the warrant to review; and every summons or warrant to attend before a master shall be considered preceptory." Chancery Rule 104.

¹ Ct. App. 1869, *Sudlow v. Knox*, 7 Abb. N. S. 411.

² Code Civ. Proc. §§ 855, 856.

³ "The master shall be at liberty to examine any witness or party, or any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or in both modes, as the nature of

the case may appear to him to require; the examination or evidence being taken down at the time by the master, or by his clerk in his presence, and preserved, in order that the same may be used by the court if necessary." Chancery Rule, 105; N. Y. Super. 1851, *Wiggin v. Gans*, 6 Super. 646.

⁴ Chancery Rule 107; *ante* P. 89.

⁵ 1 Barb. Ch. Pr. p. [510]; Chancery, 1817, *Remsen v. Remsen*, 2 J. Ch. 495; N. Y. Super. 1851, *Wiggin v. Gans*, 6 Super. 646.

⁶ Chancery, 1817. M. E. Church *v. Jaques*, 3 J. Ch. 77.

⁷ Code Civ. Proc. § 2734; *Wilcox v. Smith*, 26 Barb. 316.

⁸ Chancery, 1817, *Remsen v. Remsen*, 2 J. Ch. 495.

Chancellor Kent was of the opinion that items below twenty dollars, not exceeding five hundred in all, should be allowed though no vouchers were produced.¹ An admission, oral or written, may dispense with the necessity for a voucher.² It will be assumed that the date in the books of the accounting party are correct;³ but either party may show errors.⁴ The general form of the report is the same as in other interlocutory references.⁵ The schedules should distinctly state the items allowed;⁶ but where the referee was directed to ascertain the moneys due, and which of the goods in the hands of a receiver belonged to the trust estate, and he reports that all save a small portion, valued at a nominal sum, was owned by the trust a separation into items is unnecessary.⁷ Partners cannot be allowed for services in the care and management of the business;⁸ nor, in the absence of a special agreement can one be allowed for services in settling the affairs of the firm;⁹ nor his expenses when abroad on his own business.¹⁰ If a partner has used partnership funds for his own benefit he must account for profits and interest.¹¹ Interest should be charged from the date of dissolution of a partnership, and the balance adjusted as of that date.¹² Scandalous or impertinent matter in any account, state of facts, or affidavits introduced before the referee, may be stricken out on motion by the referee. To his refusal to strike out such matter an exception will lie, and his decision may be reviewed on the hearing on the report.¹³ If the account, state of

¹ Chancery, 1817, *Remsen v. Remsen*, 2 J. Ch. 495.

² Chancery, 1817, *M. E. Church v. Jaques*, 3 J. Ch. 77.

³ Chancery, 1816, *Stoughton v. Lynde*, 2 J. Ch. 209.

⁴ Chancery, 1832, *Heartt v. Corning*, 3 Paige, 566.

⁵ *Ante* P. 88.

⁶ Sup'm. Ct. 1874, *Spooner v. Le-fevre*, 2 T. & C. 666.

⁷ Com. Pl. Sp. T. 1878, *Hooley v. Gieve*, 9 Abb. N. C. 8.

⁸ Chancery, 1814, *Franklin v.*

Robinson, 1 Johns. Ch. 157; Chancery, 1818, *Bedford v. Kimberly*, 3 J. Ch. 43; Chancery, 1839, *Dougherty v. Van Nostrand*, Hoff. Ch. 68.

⁹ N. Y. Super. 1853, *Coursen v. Hamlin*, 9 Super. 513.

¹⁰ Chancery, 1822, *Munford v. Murray*, 6 J. Ch. 1.

¹¹ Chancery, 1815, *Stoughton v. Lynch*, 1 J. Ch. 467.

¹² Chancery, 1816, *Stoughton v. Lynch*, 2 J. Ch. 209.

¹³ "If a party wishes to complain of any matter introduced into any state

facts or other proceedings are insufficient the defect may be corrected, and the referee's ruling thereon may be reviewed in the same manner.¹ Separate reports may from time to time be made as the referee may deem expedient.

§ 5. **Reference to take Depositions to be Read on Motion.**—A referee may be appointed to take the deposition of a person not a party to be read on a motion in a court of record upon proof, by affidavit that the applicant intends to make, or oppose a motion, specifying its nature, that the affidavit sought is necessary thereon, and that the person referred to has refused to make an affidavit of facts within his knowledge.² No notice of motion is necessary, nor can the opposing party move to vacate the order.³ It will usually be sufficient if the moving affidavit is made by the attor-

of facts, affidavit, or other proceedings before the master, on the ground that it is scandalous or impertinent, or that any examination of a party before him as insufficient, such party shall be at liberty to file exceptions thereto with the master; and without any order of reference, he may take out a warrant for the master to examine the matter upon such exceptions, and the master shall have authority to expunge any such matter which he shall find to be scandalous or impertinent. And where the matter is excepted to as scandalous or impertinent, if the master disallows the exceptions, his decision thereon shall be final as to the exceptions which are disallowed; but this shall not preclude the party from insisting upon the impertinence at the hearing of the cause, or upon any subsequent proceeding founded on the master's report upon the reference, or upon the taxation of the general costs of the cause or of the reference. And in deciding on the sufficiency or insufficiency of the examination of a party or of an answer to a bill, the master shall al-

ways take into consideration the relevancy or materiality of the statement or question referred to in the exception. On exceptions to the master's report, or to his certificate of the sufficiency or insufficiency of an examination, the parties shall be confined to the objections taken before the master. Chancery Rule 106.

¹ In all matters referred to a master, he shall be at liberty, upon the application of any party interested, to make a separate report or reports from time to time, as he shall deem expedient; the costs of such separate reports to be in the discretion of the court. And where the master shall make a separate report of debts or legacies, he shall be at liberty to make such certificate as he thinks fit with respect to the state of the assets; and any person interested shall thereupon be at liberty to apply to the court, as he shall be advised. Chancery Rule 108.

² Code Civ. Proc. § 885.

³ Sup'm. Ct. 1874, *McCue v. Tribune Ass'n*, 1 Hun. 467; N. Y. Super. 1867, *Brooks v. Schultz*, 28 Super. 656.

ney.¹ It should show that a motion is, or is about to be made, that the person referred to has knowledge of facts pertinent on said motion, that he has refused to make affidavit thereto, should show with reasonable certainty the subject as to which the affidavit is required, and how, and in what manner the affidavit sought is necessary.² An allegation that he believes that facts are within such person's knowledge, which, in his opinion, are necessary, is insufficient.³ Before the application is made an affidavit should be drawn and presented with a request to sign,⁴ but this is not indispensable.⁵ Refusal for several successive days to make the affidavit until he could consult his counsel, is a refusal.⁶ The order should require the person to attend and be examined before the court, or a referee, at a time mentioned therein, or at such time and place as the referee shall direct ;⁷ and since the order can be made only for the purposes of the motion, and not to obtain evidence to be used on the trial for "fishing" purposes,⁸ should limit the scope and extent of the examination to be had. The order cannot be vacated on motion of the adverse party ;⁹ it may be on motion of the party to be examined,¹⁰ but not after he has appeared and submitted to an examination.¹¹ The

¹ N. Y. Super. Sp. T. 1867, *Moses v. Banker*, 30 Super. 131.

² Code Civ. Proc. § 885 N. Y. Super. Sp. T. 1867, *Moses v. Banker*, 30 Super. 131; Sup'm. Ct. Sp. T. Matter of *Bannister*, 1 Law Bul. 9; Sup'm. Ct. Sp. T. 1874, *Dauchy v. Miller*, 16 Abb. N. S. 100.

³ N. Y. Super. 1873, *Corkey v. Hurd*, 36 Super. 42; 14 Abb. N. S. 183; 45 How. 70.

⁴ Sup'm. Ct. Sp. T. 1868, *Fisk v. Chicago Co.* 3 Abb. N. S. 430; Sup'm. Ct. Sp. T. 1872, *Erie Co. v. Gould*, 14 Abb. N. S. 279.

⁵ Sup'm. Ct. Sp. T. 1874, *Dauchy v. Miller*, 16 Abb. N. S. 100.

⁶ Sup'm. Ct. 1874, *Rogers v. Durrant*, 2 T. & Co. 676.

⁷ N. Y. Com. Pl. Sp. T. 1864, *Clark v. Brooks*, 26 Hun, 254.

⁸ Sup'm. Ct. Sp. T. 1868, *Fisk v. Chicago Co.* 3 Abb. N. S. 430; Sup'm. Ct. Sp. T. 1872, *Erie Co. v. Gould*, 14 Abb. N. S. 279; Sup'm. Ct. Sp. T. 1874, *Dauchy v. Miller*, 15 Abb. N. S. 100.

⁹ Sup'm. Ct. Sp. T. 1870, *Ramsay v. Gould*, 39 How. 62; N. Y. Super. 1867, *Brooks v. Schultz*, 28 Super. 656; Sup'm. Ct. 1874, *McCue v. Tribune*, 1 Hun, 469; *contra* *Moses v. Banker*, 30 Super. 131.

¹⁰ Sup'm. Ct. 1874, *McCue v. Tribune*, 1 Hun, 469, Sup'm. Ct. Sp. T. 1870, *Ramsay v. Gould*, 39 How. 62; Sup'm. Ct. Sp. T. 1868, *Erie Co. v. Champlain*, 35 How. 73.

¹¹ Sup'm. Ct. 1874, *McCue v. Tribune Co.* 1 Hun, 469; Sup'm. Ct. Sp. T. 1868, *Erie Co. v. Champlain*, 35 How. 74.

referee must be sworn, and must fix the time and place of hearing, as in other interlocutory references.¹ If the person to be examined is a resident of the state, he cannot be compelled to attend in any county other than the one in which he resides, or in which he has an office for personally transacting his business, or if a non-resident, he can be compelled to attend only in the county in which he is served, unless for special reasons stated in the affidavit the order otherwise directs.² The adverse party is not entitled to notice of hearing. He can take no part in the examination;³ the referee is appointed to take, not to make, the examination.⁴ Refusal to answer proper and pertinent questions may be punished by proceedings for contempt.⁵ The affidavit on examination should be limited to the subject of the motion.⁶ The person to be examined may appear, and make, and verify his statement in narrative form, or the examination may be taken by question and answer,⁷ but a general examination on the merits of the action will not be allowed,⁸ nor a fishing examination,⁹ nor can books and papers be examined.¹⁰ If the witness does not know the facts sought to be proved, he cannot be compelled to take any means to inform himself, nor to produce anything that contains such information.¹¹ The referee has no power to pass on objections to the evidence;¹² he should take all that is offered, and leave the question of competency to be determined by the court.¹³

¹ *Ante*, P. 84.

² Code Civ. Proc. § 886.

³ Sup'm. Ct. 1874, *McCue v. Tribune*, 1 Hun, 469; Sup'm. Ct. Sp. T. 1868, *Erie Co. v. Champlain*, 35 How. 73; Sup'm. Ct. Sp. T. 1872, *Erie Co. v. Gould*, 14 Abb. N. S. 279; *contra* *Brooks v. Schultz*, 28 Super. 656; 3 Abb. N. S. 124.

⁴ Code Civ. Proc. § 885.

⁵ Code Civ. Proc. § 885; Com. Pl. Sp. T. 1864, *Clark v. Brooks*, 26 How. 254.

⁶ Sup'm. Ct. Sp. T. 1872, *Erie Co. v. Gould*, 14 Abb. N. S. 279.

⁷ Sup'm. Ct. Sp. T. 1872, *Erie Co. v. Gould*, 14 Abb. N. S. 279.

⁸ Sup'm. Ct. Sp. T. 1872, *Erie Co. v. Gould*, 14 Abb. N. S. 279;

Sup'm. Ct. Sp. T. 1874, *Dauchy v. Miller*, 16 Abb. N. S. 100; N. Y. Super. *Cockey v. Hurd*, 36 Super. 42.

⁹ N. Y. Super. Sp. T. 1867, *Moses v. Banker*, 30 Super. 131; Sup'm. Ct. Sp. T. 1868, *Fisk v. Chicago Co.* 3 Abb. N. S. 430.

¹⁰ Sup'm. Ct. Sp. T. 1868, *Fisk v. Chicago*, 3 Abb. N. S. 430.

¹¹ Sup'm. Ct. Sp. T. 1868, *Fisk v. Chicago Co.* 3 Abb. N. S. 430.

¹² 1873, *Fox v. Moyer*, 54 N. Y. 125.

¹³ Sup'm Ct. Sp. T. 1862, *Scott v. Williams*, 23 How. 393.

§ 6. **Reference of Question of Fact arising on Motion.**—A question of fact arising on motion may be referred,¹ but the practice is objectionable;² it will not be ordered on motion to vacate an order of arrest where the affidavits are full and complete,³ nor will a referee be appointed to take a deposition or affidavit to be used on an *ex parte* motion.⁴ The court may order the reference, of its own motion, or on motion of either party,⁵ and may invest the referee with all necessary power,⁶ may prescribe what notice of hearing shall be given, may order the personal attendance of parties and witnesses, direct the order of examination, and forbid an application for a commission to examine witnesses without the state;⁷ on such motion the witnesses may be cross-examined;⁸ the reference may be ordered when the affidavits are not sufficiently definite and certain;⁹ a reference may be ordered on motion to discharge from arrest,¹⁰ to vacate an attachment,¹¹ to satisfy a judgment,¹² to cancel a judgment entered on confession,¹³ for an attachment against an attorney for not paying over money,¹⁴ to report facts as to an attorney's lien,¹⁵ to mark a judgment secured on appeal,¹⁶ or to set aside a judgment against a lunatic,¹⁷ or where the validity of an assignment occurs on question

¹ Code Civ. Proc. § 1015.

² Sup'm. Ct. Sp. T. 1865, *Hewlet v. Rogers*, 1 Abb. N. S. 27.

³ N. Y. Super. Sp. T. 1858, *Stelle v. Palmer*, 7 Abb. 181.

⁴ Sup'm. Ct. 1874, *Hart v. Hatch*, 1 Hun, 238.

⁵ N. Y. Super. 1876, *Burnet v. Snyder*, 41 Super. 342.

⁶ Sup'm. Ct. 1853, *Meyer v. Lent*, 16 Barb. 538; Sup'm. Ct. Chamb. 1873, *Tammissen v. Clause*, 67 Barb. 430.

⁷ Sup'm. Ct. 1886, *Stubbs v. Ripley*, 39 Hun, 620.

⁸ Sup'm. Ct. 1853, *Meyer v. Lent*, 16 Barb. 538.

⁹ Ct. App. 1855, *Meyer v. Lent*, 7 Abb. 225.

¹⁰ Sup'm. Ct. Sp. T. 1857, *Barron v. Sanford*, 14 How, 443; 6 Abb.

320 n.; N. Y. Super. Sp. T. 1858, *Stelle v. Palmer*, 7 Abb. 181; Buf. Super. Sp. T. 1879, *Stafford v. Ambs*, 8 Abb. N. C. 237.

¹¹ N. Y. Super. 1876, *Burnett v. Snyder*, 41 Super. 342.

¹² 1858, *Pendleton v. Weed*, 17 N. Y. 72; Ct. App. 1855, *Meyer v. Lent*, 7 Abb. 225.

¹³ 1862, *Dwight v. St. John*, 25 N. Y. 203.

¹⁴ Sup'm. Ct. Sp. T. 1855, *Barber v. Case*, 12 How. 351.

¹⁵ 1872, *Marshall v. Meach*, 51 N. Y. 140; Sup'm. Ct. 1877, *Brown v. Mayor*, 9 Hun, 587.

¹⁶ Sup'm. Ct. 1856, *Munn v. Barnum*, 2 Abb. 409.

¹⁷ Sup'm. Ct. 1860, *Demelt v. Leonard*, 19 How. 140; 11 Abb. 252.

on a motion.¹ An application for a mandamus to compel transfer agents of a foreign corporation to allow stockholders to examine the books of such corporation, a reference may be ordered to take proof of the matters set forth in the affidavits.² A party cannot be compelled to submit to an examination on such reference.³ The moving party may be compelled to pay the fees of the referee;⁴ no exceptions to the report should be filed.⁵ The findings of fact are not conclusive, they are required only to inform the conscience of the court;⁶ nor is the opinion or conclusion of the referee binding.⁷ The order of reference cannot be vacated by the adverse party on the ground that the decision of the motion is thereby delayed,⁸ nor on the ground that no order was actually entered.⁹ The adverse party may enter it if the moving party does not within twenty-four hours.¹⁰

§ 7. **Reference to Examine Party before Trial.**—A referee may be appointed to take the deposition of a party or witness before trial. The order must require the party or person to appear before the judge or before a referee named in the order, for the purpose of taking the examination, at a time and place therein specified,¹¹ the examination of a

¹ 1877, *Conklin v. Taylor*, 68 N. Y. 221.

² N. Y. Super. 1876, *Burnett v. Snyder*, 41 Super. 342; Ct. App. 1855, *Meyer v. Lent*, 7 Abb. 225; 1874, *King v. Leighton*, 58 N. Y. 383; see *Stubbs v. Ripley*, 39 Hun, 620.

³ Sup'm. Ct. 1887, *People v. St. Louis Co.* 44 Hun, 552; 1873, *Dwight v. St. John*, 25 N. Y. 203.

⁴ Sup'm. Ct. Sp. T. 1873, *Tammissen v. Clause*, 67 Barb. 430.

⁵ Sup'm, Ct. Chamb. 1887, *Kelly v. Charlier*, 18 Abb. N. C. 416; Sup'm Ct. Sp. T. 1865, *Hewlet v. Reyns*, 1 Abb. N. S. 27; Sup'm. Ct. 1887, *Martin v. Hodges*, 45 Hun, 38.

⁶ 1872, *Marshall v. Meach*, 51 N.

Y. 140; 1874, *People v. D. & C. R. R. Co.* 58 N. Y. 152.

⁷ Sup'm. Ct. 1865, *Hewlet v. Reyns*, 1 Abb. N. S. 27; 1874, *Anstin v. Ahearne*, 61 N. Y. 6; Sup'm. Ct. Chamb. 1887, *Kelly v. Charlier*, 18 Abb. N. C. 416; Sup'm. Ct. 1886, *Hodges v. Martin*, 45 Hun. 38; 1872, *Marshall v. Meach*, 51 N. Y. 140.

⁸ Buf. Super. Sp. T. 1879 *Staford v. Ambs*, 8 Abb. N. C. 237.

⁹ Buf. Super. Sp. T. 1879, *Staford v. Ambs*, 8 Abb. N. C. 237.

¹⁰ Buf. Sup'm, Sp. T. 1879, *Staford v. Ambs*, 8 Abb. N. C. 237; Sup'm. Ct. Sp. T. 1861, *Peet v. Cowenhoven*, 14 Abb. 56; Sup'm. Ct. 1876, *Matter of Rhinebeck Co.* 8 Hun, 34.

¹¹ Code Civ. Proc. § 873.

party or an expected party is subject to the same rules as if he was examined on the trial.¹ The referee must take the examination at the time and place specified in the order. He may from time to time adjourn the examination to another day and to another place in the same county.² Any question competent on the trial is competent on this examination.³ Objection to the form of the questions must be made when the deposition is taken, otherwise it will be deemed waived.⁴ Whether discovery of books and papers can be had on the examination of a party is an open question. It has been held in the supreme court and the city court of Brooklyn, and in the marine court of New York, that it could not;⁵ the contrary has been held in the New York superior court.⁶ The superior court of New York has also held that while production of books could be compelled, inspection thereof could not;⁷ but when a party under examination has voluntarily referred to his books he can be compelled to produce them or to disclose their contents.⁸ The referee must insert in the testimony every answer or declaration of the person examined which either party requires. If the person refuses to answer, he must report the fact to the court or judge who must determine whether the question is relevant or the witness is bound to answer.⁹ Defendant cannot be compelled to produce letters to enable plaintiff to see if they are relevant.¹⁰ It is not necessary that the referee write down the evidence. It is sufficient that after administering the proper oath he allowed another to write down the testimony, and after the examination is closed he read it over

¹ Code Civ. Proc. § 880.

² Code Civ. Proc. § 876.

³ Sup'm. Ct. 1874, *Dambmann v. Butler*, 2 Hun, 284; 4 T. & C. 542.

⁴ 1877, *Hubbard v. Haughian*, 70 N. Y. 54.

⁵ Sup'm. Ct. Chamb. 1877, *Martin v. Spofford*, 3 Abb. N. C. 125; City Court, Brooklyn, 1878, *Parsons v. Belden*, 9 Abb. N. C. 54; Marine

Court of N. Y. Sp. T. 1881, *Black v. Curry*, 1 Civ. Proc. 193.

⁶ N. Y. Super. Ct. Sp. T. 1878, *Pirz v. Follett*, 1 Civ. Proc. 185.

⁷ N. Y. Super. Ct. Sp. T. 1878, *McGuffin v. Dinsmore*, 4 Abb. N. C. 241.

⁸ Sup'm Ct. Chamb. 1880, *Morrison v. McDonald*, 9 Abb. N. C. 57 n.

⁹ Code Civ. Proc. § 880.

¹⁰ N. Y. Super. Sp. T. 1880, *Newhall v. Appleton*, 2 Law Bul. 35.

to the party testifying that the latter may know whether his answers have been correctly taken down.¹ The deposition, when completed, must be carefully read to and subscribed by the party examined; must be certified by the referee taking it, and within ten days thereafter filed in the office of the clerk, or if no action is pending, in the office of the clerk of the county in which it was taken, together with the stipulation or order under which it was taken, the affidavit upon which the order was granted, and proof of the service of a copy of the order and of the affidavit.² The certificate must show affirmatively that the parties appeared, that the proper oath was administered, that the deposition was read over to the witness by or in the presence of the officer taking it before signature, and that the witness did in fact sign the same.³ It is not essential that the referee should certify the deposition was "carefully" read. The court will presume that the law was complied with.⁴

§ 8. **Reference to take Proof on application for Judgment by Default.**—A reference may be ordered on application for judgment by default,⁵ the order may direct that the report of the referee be returned to the court for further action, or it may omit such direction, but such reference cannot be ordered in actions for wrongs.⁶ The hearing is brought on, and the proceedings thereon are the same as in other interlocutory references.⁷ It must be had in the county named in the complaint as the place of trial.⁸ When the defaulting party is not shown to have any actual knowledge of the facts, his absence is no ground for postponing the hearing;⁹ he may call witnesses, and prove any matter in

¹ Com. Pl. 1859, *McDonald v. Gar- rison*, 9 Abb. 34; 18 How, 249; Sup'm. Ct. 1877, *Foster v. Bullock*, 12 Hun, 200.

² Code Civ. Proc. § 880.

³ Sup'm. Ct. 1877, *Foster v. Bullock*, 12 Hun, 200.

⁴ N. Y. Super. 1857, *Sheldon v. Wood*, 15 Super. 267.

⁵ Code Civ. Proc. § 1215.

⁶ Code Civ. Proc. § 1215; Sup'm.

Ct. Chamb. 1849, *Rickards v. Swit- zer*, 3 How. 413; N. Y. Sup'm. Ct. Sp. T. 1856, *Saltus v. Kip*, 2 Abb. 382; Com. Pl. 1880, *Thompson v. Finn*, 11 Week. Dig. 182.

⁷ *Ante*, p. 84.

⁸ Sup'm. Ct. Sp. T. 1861, *Brush v. Mullany*, 12 Abb. 344.

⁹ Sup'm. Ct. Sp. T. 1872, *Samuels v. Bryant*, 14 Abb. N. S. 442.

mitigation of damages,¹ but cannot prove a partial defense.² A report must be made and filed as part of the judgment roll.³

§ 9. **Reference to Sell Chattels on Foreclosure of a Lien thereon.**—A referee may be appointed to sell chattels upon foreclosure of a lien thereon. The judgment must specify the amount of the lien, and direct a sale to satisfy the same, and the costs, if any, by the referee or some officer appointed therein, in like manner as where a sheriff sells personal property by virtue of an execution, and the application by him of the proceeds of the sale, less his fees and expenses, to the payment of the costs of the action. It must also provide for the payment of the surplus to the owner of the chattel, and for the safe-keeping of the surplus, if necessary, until it is claimed by him.⁴ At least six days' notice of the time and place of sale must be given, by posting conspicuously written or printed notices thereof in at least three public places of the town or city where the sale is made;⁵ and must be made within a reasonable time after the entry of the order or decree.⁶ The referee may, from time to time, postpone the sale, and should do so if he sees that otherwise the property will be sacrificed.⁷ He cannot, for his own benefit, bind himself by a contract that would prevent him from obeying the judgment.⁸ The death of a creditor after the sale is ordered does not operate as a stay.⁹ The property must be offered in such lots and parcels as are calculated to bring the highest price. Except where the officer is expressly authorized by Art. 2,

¹ N. Y. Super. Ct. Sp. T. 1856, *Saltus v. Kip*, 2 Abb. 382; Sup'm. Ct. Cir. 1848, *Warren v. Kenny*, N. Y. 3 How. 323.

² N. Y. Super. 1857, *Ford v. David*, 14 Super. 569.

³ N. Y. Super. 1857, *Am. Ex. B'k v. Smith*, 6 Abb. 1.

⁴ Code Civ. Proc. § 1739.

⁵ Code Civ. Proc. § 1429.

⁶ Sup'm. Ct. 1826, *Russell v. Gibbs*,

5 Cow. 390; Ct. Err. 1823, *McDonald v. Neilson*, 2 Cow. 139.

⁷ Ct. of Err. 1823, *McDonald v. Neilson*, 2 Cow. 139.

⁸ Ct. of Err. 1823, *McDonald v. Neilson*, 2 Cow. 139; Sup'm. Ct. 1862, *Perkins v. Proud*, 62 Barb. 420.

⁹ Sup'm. Ct. 1866, *Becker v. Becker*, 47 Barb. 497; 1871, *Wood v. Moorhouse*, 45 N. Y. 368.

Title 2, Chap. XIII, of Chapter 448, L. 1876, to sell property not in his possession, personal property must not be offered for sale unless it is present, and within the view of those attending the sale;¹ but where several articles are sold, subject to a chattel mortgage, the whole must be sold as one lot.² The property must be designated, and specifically pointed out;³ otherwise the sale is invalid.⁴ That all the property was not present, does not affect the validity of the sale of what was shown.⁵ Where the decree is directed against one member of a firm, only his interest in the firm can be disposed of. If the whole interest is sold, the referee and all who participate are liable as trespassers.⁶ The sale must be for cash; until the money is paid the sale is invalid.⁷ If the referee takes the check of the purchaser, and gives him possession of the property, he is liable for the amount of the bid.⁸ The referee cannot purchase at the sale;⁹ but plaintiff may.¹⁰ Goods may be delivered to him without payment,¹¹ and a purchase to the amount of the judgment operates as a satisfaction.¹² To pass the title as against creditors, there must be a delivery, and change of possession.¹³ While the referee may take indemnity from the plaintiff, he cannot indemnify bidders.¹⁴ If the bidder refuses to pay, the referee must avoid the sale,

¹ Code Civ. Proc. § 1428.

² 1861, *Manning v. Monaghan*, 23 N. Y. 539; Sup'm. Ct. 1847, *Tefft v. Barton*, 4 Den. 171.

³ Sup'm. Ct. 1848, *Waring v. Loomis*, 4 Barb. 484.

⁴ Com. Pl. 1854, *Breese v. Bunge*, 2 E. D. S. 474; Sup'm. Ct. 1817, *Sheldon v. Soper*, 14 Johns. 352.

⁵ Sup'm. Ct. 1817, *Liliendoll v. Doe*, 14 Johns. 222.

⁶ N. Y. Super. 1854, *Bates v. James*, 10 Super. 45; N. Y. Super. 1854, *Haring v. Hoppock*, 10 Super. 20; Sup'm. Ct. 1846, *Walsh v. Adams*, 3 Den. 125; Sup'm. Ct. 1874, *Turgwell v. Bussing*, 2 Hun, 160; 43 How. 89; Sup'm. Ct. 1841, *Waddell v. Cook*, 2 Hill, 47.

⁷ Sup'm. Ct. 1880, *Holmes v. Richmond*, 19 Hun, 634.

⁸ 1882, *Robinson v. Brennan*, 90 N. Y. 208.

⁹ Sup'm. Ct. 1830, *Jackson v. Anderson*, 4 Wend. 474; Sup'm. Ct. 1862, *Ball v. Pratt*, 36 Barb. 402.

¹⁰ Sup'm. Ct. Sp. T. 1847, *Weaver v. Toogood*, 1 Barb. 238.

¹¹ Sup'm. Ct. 1821, *Nichols v. Ketcham*, 19 Johns. 84; Sup'm. Ct. 1826, *Russell v. Gibbs*, 5 Cow. 390.

¹² Sup'm. Ct. Sp. T. 1847, *Weaver v. Toogood*, 1 Barb. 238.

¹³ 1881, *Stimson v. Wrigley*, 86 N. Y. 332.

¹⁴ Sup'm. Ct. 1862, *Ball v. Pratt*, 36 Barb. 402.

and re-sell; or postpone the sale, giving notice, and make a new one at a subsequent time.¹ The sale must be at public auction, between the hours of nine o'clock in the morning and sunset.² There are no express provisions in the code, nor in the rules of court regulating the procedure at the sale. Since the proceeding is similar to a sale under the foreclosure of a mortgage upon real property, a procedure as near as may be in accordance therewith would undoubtedly be safe;³ and so of a bill of sale of the property and the report of the referee.⁴ The fees of the referee on such sale are nowhere prescribed. If, as in sales on foreclosure of a mortgage on real property, or in dower, or partition, they are the same as those of a sheriff for performing similar duties, the referee is entitled in the counties of New York, Kings and Westchester to two and one-half per cent. on the first two hundred and fifty dollars, and one and one-quarter per centum on the residue; in all other counties in this state the fees are three and one-half per centum on the first two hundred and fifty dollars, and two per centum on the residue.⁵ The referee is also entitled to two dollars for advertising the sale.⁶ These fees are in full for all his services,⁷ including the commissions of the auctioneer, if any be employed.⁸ In one unreported case the fees of the referee to sell were taxed as in sale of real property under foreclosure of a mortgage thereon, not including auctioneer's fees.

¹ 1882, *Robinson v. Brennan*, 90 N. Y. 208.

² Code Civ. Proc. § 1384.

³ See P. 157 *et seq.*

⁴ See P. 169 *et seq.*

⁵ Code Civ. Proc. § 3307, P. 7.

⁶ Code Civ. Proc. § 3307, P. 8.

⁷ 1874, *Croft v. Brandt*, 58 N. Y. 106; 1882, *McKeon v. Horsfall*, 88 N. Y. 429.

⁸ 1882, *McKeon v. Horsfall*, 88 N. Y. 429.

PART III.

References in Special Proceedings.

CHAPTER I.

GENERAL PROVISIONS APPLICABLE THERETO.

A reference may be ordered in a special proceeding even in cases not expressly authorized by statute.¹ Such references are generally discretionary, and are usually ordered by the court, or by a judge thereof of his own motion;² if made in pursuance of a statute, such statute must be strictly followed.³ A reference may be ordered in proceedings under the assignment act,⁴ in mandamus proceedings,⁵ in proceedings supplementary to execution,⁶ in disputed claims against the estate of a decedent,⁷ in proceedings to sell the real estate of an infant or lunatic,⁸ in proceedings under the assessment act of 1874,⁹ and in any other case where the facts on a summary application are not sufficiently clear.¹⁰ The order is sometimes made by the judge at

¹ Sup'm. Ct. 1875, *Matter of Bohm*, 4 Hun, 558; 1862, *Dwight v. St. John*, 25 N. Y. 203.

² Code Civ. Proc. § 2434; Com. Pl. 1878, *Matter of Bonner*, 8 Daly, 75; 1862, *Dwight v. St. John*, 25 N. Y. 203.

³ Com. Pl. Sp. T. 1887, *Matter of Ives*, Daily Reg. Sept. 14, 1887; 1878, *Matter of Valentine*, 72 N. Y. 184.

⁴ L. 1877, ch. 466 §§ 21, 26; Com. Pl. 1878, *Matter of Bonner*, 8 Daly, 75.

⁵ Code Civ. Proc. § 2083; 1874,

People v. D. & C. R. R. Co. 58 N. T. 152; 1862, *Dwight v. St. John*, 25 N. Y. 205; Sup'm. Ct. 1887, *People v. R. R. Co.* 44 Hun, 552.

⁶ Code Civ. Proc. § 2434; Sup'm. Ct. 1885, *Hulsam v. Wiles*, 11 How. 446.

⁷ 2 R. S. 88, § 41.

⁸ Code Civ. Proc. § 2354.

⁹ Sup'm. Ct. 1875, *Matter of Bohm*, 4 Hun, 558.

¹⁰ 1862, *Dwight v. St. John*, 25 N. Y. 203; Com. Pl. 1878, *Matter of Bonner*, 8 Daly, 75; Code Civ. Cir. § 2546.

chambers,¹ sometimes by the court.² In either event it should distinctly state the object and scope of the reference. The referee has no power beyond that expressly conferred.³ He must possess the same qualifications as one appointed for the trial of issues; is entitled to the same compensation, and must be sworn before proceeding with the hearing.⁴ The oath may be waived by written stipulation or orally, but if orally such waiver must be entered in the minutes of the referee,⁵ or as held in some cases by proceeding before the referee without objection.⁶ If there are infants who may be affected by the result, there can be no waiver.⁷ The order may fix the time and place of hearing,⁸ or it may leave it to be fixed by the referee;⁹ if fixed by the referee it is governed by the same rules as an interlocutory reference.¹⁰ Subpœnas to compel the attendance of witnesses and the production of books, documents and papers, must be issued under the hand of the referee;¹¹ if issued out of the court in which the proceeding is pending, it is invalid.¹² The court or a judge thereof alone has authority to punish disobedience of the subpœna.¹³ The method of procedure on the reference depends upon the form of the order. If it is a reference to take and report the evidence the referee has no authority to pass upon objections thereto, he must take all that is offered. To make the objections available they must be

¹ Code Civ. Proc. § 2434.

² Com. Pl. 1878, *Matter of Bonner*, 8 Daly, 75; Code Civ. Proc. § 2546.

³ Sup'm. Ct. 1860, *Bonner v. McPhail*, 31 Barb. 106; Com. Pl. Sp. T. 1887, *Matter of Ives*, Daily Reg. Sept. 14, 1887; 1853, *McCracken v. Valentine*, 9 N. Y. 42.

⁴ *Ante*, p. 6; Com. Pl. Sp. T. 1880, *Matter of Schaller*, 10 Daly, 57; Com. Pl. 1881, *Matter of Fairchild*, 10 Daly, 74; Code Civ. Proc. § 1016; Com. Pl. Sp. T. 1878, *Matter of Vilmar*, 10 Daly, 15.

⁵ Code Civ. Proc. § 1016; Com. Pl. Sp. T. 1878, *Matter of Vilmas*,

10 Daly, 15; Sup'm. Ct. Sp. T. 1878, *Browning v. Marvin*, 5 Abb. N. C. 285.

⁶ Com. Pl. Sp. T. 1878, *Nason v. Luddington*, 55 How. 342.

⁷ Code Civ. Proc. § 1016.

⁸ Sup'm. Ct. 1886, *Stubbs v. Ripley*, 39 Hun, 620; Sup'm Ct. 1853, *Meyer v. Lent*, 16 Barb. 538; Code Civ. Proc. § 2434.

⁹ Code Civ. Proc. § 2354.

¹⁰ *Ante*, p. 86.

¹¹ Code Civ. Proc. § 854.

¹² Sup'm. Ct. 1885, *People v. Jacobs*, 37 Hun, 245.

¹³ Code Civ. Proc. § 856.

renewed when the report is filed.¹ If to take and state an account, he must, if requested, follow the old chancery practice.² Unless otherwise expressly ordered. He may retain his report until his fees are paid.³ Section 1016 of the code has no application to special proceedings.⁴ The form of the report depends upon the character of the reference. It must in all cases contain the title of the cause, must be addressed to the court, must recite the order and contain an epitome, but not the whole of its contents.⁵ Except in the surrogate's court⁶ the testimony of the witnesses must be signed by them and filed with the report,⁷ as the report, when the referee is to report the evidence,⁸ as a separate schedule when more than the evidence is to be reported.⁹ In the latter case the report will consist of two parts, the body and the schedules; the body containing the report proper, referring to the schedules for detailed information.¹⁰ If the statute or the rules of court prescribe the form they must be strictly followed.¹¹ The provisions of rule 30 requiring exceptions to the report to be filed within eight days after filing the report and notice thereof, applies only to those cases where the referee is to decide between parties. It has no application to references ordered by the court for its own information.¹² A referee under the assignment act is a competent judge of the value of the services of the assignee.¹³ On application by an assignee for leave to compromise a claim the court may send the matter to a referee, and require notice to be given cred-

¹ 1873, *Fox v. Moyer*, 54 N. Y. 125.

² For procedure on accounting, see *ante*, p. 94.

³ N. Y. Surr. 1885, *Matter of Kraus*, 4 Dem. 217.

⁴ Sup'm. Ct. 1864, *Godding v. Porter*, 17 Abb. 374.

⁵ 1 Barb. Ch. Pr. (548).

⁶ N. Y. Surr. 1885, *Matter of Russell*, 3 Dem. 377.

⁷ Rule 30.

⁸ Com. Pl. Sp. T. 1887, *Matter of Ives*, Daily Reg. Sept. 14, 1887.

⁹ 1 Barb. Ch. Pr. (548).

¹⁰ 1 Barb. Ch. Pr. (548).

¹¹ Com. Pl. Sp. T. 1880, *Matter of Phillip*, 10 Daly 47; Com. Pl. 1878, *Matter of Dryer*, 10 Daly, 8; Com. Pl. Sp. 1880, *Matter of Schaller*, 10 Daly, 57.

¹² Sup'm. Ct. Sp. T. 1883, *Matter of Att'y-Gen. v. Continental L. I. Co.* 64 How. 93.

¹³ 1866, *Duffy v. Duncan*, 35 N. Y. 187.

itors.¹ An order of reference to take proof of charges against an assignee for the benefit of creditors is not appealable to the court of appeals.²

CHAPTER II.

REFERENCE. TO ASCERTAIN DAMAGES CAUSED BY INJUNCTION.

SECTION 1.—When ordered.

SECTION 2.—What damages may be allowed.

SECTION 3.—Report of referee.

§ 1. **When Ordered.**—A reference may be ordered to ascertain the damages caused by an injunction, and the court may in its discretion direct that the sureties have notice of the hearing;³ but such reference cannot be ordered until it has been finally determined by judgment, or otherwise, that plaintiff was not entitled to the injunction.⁴ Granting an order to discontinue because plaintiff failed to succeed, is not a final determination;⁵ nor is a discontinuance by consent;⁶ nor discontinuance by agreement with no reservation of rights on the undertaking;⁷ nor is discontinuance by leave of court without costs.⁸ That the injunction was dissolved on motion, and that another court has decided plaintiff had no title, is not.⁹ The order cannot be made by a state court where the action has been removed to and is

¹ Com. Pl. Sp. T. 1879, *Matter of Youngs*, 5 Abb. N. C. 346.

² 1880, *Matter of Friedman*, 82 N. Y. 609.

³ Code Civ. Proc. § 623.

⁴ 1876, *Lawton v. Green*, 64 N. Y. 326; 1879, *Benedict v. Benedict*, 76 N. Y. 600; 1878, *Roberts v. White*, 73 N. Y. 375.

⁵ 1880, *Johnson v. Elwood*, 82 N. Y. 362.

⁶ Sup'm. Ct. Sp. T. 1881, *Young v. Campbell*, 61 How. 40.

⁷ 1877, *Palmer v. Foley*, 71 N. Y. 106; 1880, *Johnson v. Elwood*, 82 N. Y. 362.

⁸ Sup'm. Ct. Sp. T. 1881, *Neugent v. Swan*, 61 How. 40.

⁹ 1880, *Johnson v. Elwood*, 82 N. Y. 362.

still pending in the United States court, and has been discontinued as to two of the defendants.¹ Where an appeal from a judgment in favor of defendant has been perfected, the order will not be granted pending the appeal.² The application will be refused where defendant has died, and the cause of action does not survive;³ but where the action is terminated, either by a judgment of the court, or by voluntary discontinuance by plaintiff, it will be granted;⁴ or where an order refusing to continue a temporary injunction is followed by a discontinuance of the action.⁵ Where the injunction is dissolved on the bill alone it is a final determination that plaintiff is not entitled thereto;⁶ but where it is dissolved on bill and answer the reference cannot be ordered until the cause is heard.⁷ The application should be on notice, should be on all the pleadings and proceedings in the cause, and should be accompanied by an affidavit showing the condition of the action.⁸ It may be opposed by showing the final decree has not been entered; that the application for any cause is premature; or any matter that effectually bars the proceeding.⁹ The reference to ascertain damages is almost a matter of course.¹⁰ The order should be to ascertain and report the damages caused by the injunction, and in the discretion of the court,

¹ N. Y. Super. 1871, *Benedict v. Dixon*, 47 Super. 477.

² Sup'm. Ct. 1880, *Howard v. Park*, 59 How. 344; 1879, *Musgrave v. Sherwood*, 76 N. Y. 194.

³ 1880, *Johnson v. Elwood*, 82 N. Y. 362.

⁴ Sup'm. Ct. Sp. T. 1860, *Taaks v. Schmidt*, 19 How. 413; N. Y. Super. 1853, *Coates v. Coates*, 8 Super. 664.

⁵ Sup'm. Ct. 1877, *Waterbury v. Barker*, 10 Hun, 262; N. Y. Super. 1860, *Carpenter v. Wright*, 17 Super. 655; Com. Pl. Sp. T. 1869, *Pacific Co. v. Luling*, 7 Abb. N. S. 37; Sup'm. Ct. 1875, *Park v. Musgrave*, 6 Hun, 223.

⁶ Sup'm. Ct. 1847, *Dunkin v. Lawrence*, 1 Barb. 447.

⁷ Sup'm. Ct. 1847, *Dunkin v. Lawrence*, 1 Barb. 447.

⁸ 1878, *Roberts v. White*, 73 N. Y. 375; Sup'm. Ct. 1877, *Waterbury v. Bowker*, 10 Hun, 262.

⁹ 1878, *Roberts v. White*, 73 N. Y. 375; Sup'm. Ct. 1875, *Lawton v. Green*, 5 Hun, 157; 1880, *Johnson v. Elwood*, 82 N. Y. 362; 1877, *Palm-er v. Foley*, 71 N. Y. 106.

¹⁰ Sup'm. Ct. 1877, *Waterbury v. Bowker*, 10 Hun, 262; Sup'm. Ct. 1875, *Park v. Musgrave*, 6 Hun, 223; N. Y. Super. 1853, *Coates v. Coates*, 8 Super, 664; Sup'm. Ct. 1847, *Dunkin v. Lawrence*, 1 Barb. 474.

direct that notice of the hearing be given to the sureties.¹ Objections to the order must be made at the time, and an appeal taken therefrom. Proceeding with the reference, or consent thereto, is a waiver of any irregularity.² The reference can be had only against those who sign the bond;³ it may be ordered where plaintiff of his own motion vacates the injunction, and obtains an *ex parte* order of discontinuance.⁴

§ 2. **What Damages Allowed.**—The reference is not a proceeding in the action,⁵ and is conducted in the same manner as in other special proceedings. The nominal may recover for the benefit of the real party in interest.⁶ The burden is on the defendant to show what, if any, damage was sustained by him.⁷ The value of property taken in an action to establish the title thereto may be allowed;⁸ so may rent, where summary proceedings are enjoined;⁹ but not unless such rents were lost by reason of such injunction;¹⁰ and the value of crops defendant was prevented from harvesting.¹¹ Where the erection of a building was restrained, loss of rent, increased cost of labor and materials, counsel fees on successful motion to dissolve, and on appeal from the order, may be allowed;¹² so may damages caused by putting the property in the hands of a receiver but not for mismanagement while in his hands;¹³ so may fees and costs of re-advertising in foreclosure where the

¹ Code Civ. Proc. § 623; 1878, Northern R. R. Co. 54 Barb. 271; Jordan v. Volkenning, 72 N. Y. 1872, Hovey v. Rubber Tip Co. 50 300. N. Y. 335.

² 1878, Roberts v. White, 73 N. Y. 375; 1876, Lawton v. Green, 64 N. Y. 326.

³ Sup'm. Ct. 1870, Patterson v. Bloomer, 9 Abb. N. S. 27.

⁴ 1881, Pacific Mail Co. v. Tod, 85 N. Y. 646.

⁵ 1876, Lawton v. Green, 64 N. Y. 326.

⁶ 1872, Andrews v. Glenville Co. 50 N. Y. 282; Code Civ. Proc. § 624.

⁷ Sup'm. Ct. 1869, Dwight v.

⁸ 1864, Barton v. Fisk, 30 N. Y. 166.

⁹ Sup'm. Ct. 1874, Bray v. Poillon, 2 Hun, 383; 5 T. & C. 663.

¹⁰ N. Y. Super. 1874, McDonald v. James, 38 Super. 76; 47 How. 474.

¹¹ Sup'm. Ct. 1872, Allen v. Brown, 5 Lans. 511.

¹² 1878, Roberts v. White, 73 N. Y. 375.

¹³ Sup'm. Ct. 1876, Hotchkiss v. Platt, 8 Hun, 46; *affd.*, 66 N. Y.

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first sale was enjoined;¹ and counsel fees on successful motion to dissolve;² as well as services on the reference;³ and referee's fees, costs of motion to appoint referee, and of notice to surety;⁴ but counsel fees cannot be allowed for an unsuccessful effort to dissolve.⁵ Fees and expenses necessarily incurred in removing the temporary injunction, damage to business or otherwise necessarily resulting therefrom are allowable;⁶ so are counsel fees incurred on the trial solely or principally in consequence of the injunction;⁷ and taxable costs of so much of the proceedings as was necessary to procure the dissolution,⁸ with costs of the action where it is discontinued in consequence of the dissolution of the injunction;⁹ but general costs of the action are not usually recoverable.¹⁰ And where an extra allowance has been granted to cover all allowance of costs to be made in any event, damages on injunction are included.¹¹ Neither party nor sureties are liable beyond the amount specified in the undertaking.¹² Fraud in procuring the signature of sureties to the undertaking is unavailable in these proceedings.¹³

¹ Chancery 1844, *Edwards v. Bodine*, 11 Paige, 223.

² 1861, *Corcoran v. Judson*, 24 N. Y. 106; Chancery, 1844, *Edwards v. Bodine*, 11 Paige, 223; Sup'm. Ct. *Park v. Musgrave*, 6 Hun, 223; 1874, *Rose v. Post*, 56 N. Y. 603; N. Y. Super. 1853; *Coates v. Coates*, 8 Super. 664; 1882, *Newton v. Russell*, 87 N. Y. 527.

³ Sup'm. Ct. 1875, *Park v. Musgrave*, 6 Hun, 223; 1874, *Rose v. Post*, 56 N. Y. 603; 1876, *Lawton v. Green*, 64 N. Y. 326; Chancery, 1846, *Aldrich v. Reynolds*, 1 Barb. Ch. 613.

⁴ Sup'm. Ct. 1872, *Allen v. Brown*, 5 Lans. 511; 1872, *Allen v. Glendale Co.* 50 N. Y. 282.

⁵ 1872, *Hovey v. Rubber Tip Co.* 50 N. Y. 335; 1882, *Randall v. Carpenter*, 88 N. Y. 293; 1873, *Disbrow v. Garcia*, 52 N. Y. 654.

⁶ 1872, *Hovey v. Rubber Tip Co.*

50 N. Y. 335; 1882, *Randall v. Carpenter*, 88 N. Y. 293.

⁷ 1882, *Newton v. Russell*, 87 N. Y. 527; 1872, *Andrews v. Glenville Co.* 50 N. Y. 282; 1861, *Corcoran v. Judson*, 24 N. Y. 106.

⁸ Chancery, 1846, *Aldrich v. Reynolds*, 1 Barb. Ch. 613.

⁹ N. Y. Super. 1853, *Coates v. Coates*, 8 Super. 664.

¹⁰ Com. Pl. 1874, *Troxell v. Haynes*, 5 Daly, 389; 16 Abb. N. S.; 1873, *Disbrow v. Garcia*, 52 N. Y. 654.

¹¹ 1873, *Disbrow v. Garcia*, 52 N. Y. 654.

¹² 1876, *Lawton v. Green*, 64 N. Y. 326; N. Y. Super. 1870, *Leavitt v. Dabney*, 9 Abb. N. S. 373; 40 How. 280; Sup'm. Ct. 1840, *Garcia v. Sheldon*, 3 Barb. 232; 1881, *Pacific Mail Co. v. Tod*, 85 N. Y. 646.

¹³ Sup'm. Ct. 1874, *Bray v. Poillon*, 2 Hun, 383; 4 T. & C. 663.

§ 3. **Report of Referee.**—The general form of the report is the same as in other special proceedings.¹ The testimony of the witnesses must be signed by them and returned by the referee with his report.² It is not necessary, but it is sometimes advisable, to report findings of fact and conclusions of law.³ It is not essential to the validity of the report that the items of damage should be stated; if plaintiff desires this he should apply for a further and more specific report.⁴ When the referee reports damages in excess of the amount specified in the undertaking, the matter may be sent back for further evidence;⁵ or the court may reduce the amount to the proper sum.⁶ The report must be confirmed.⁷ The order of confirmation will not be reversed for a mere technical irregularity, such as failure of witnesses to sign the testimony; the remedy is by motion.⁸ The order of confirmation is conclusive as to the amount;⁹ but it can be recovered only by action.¹⁰

¹ *Ante* P. 112.

² Rule 30.

³ Sup'm. Ct. 1883, *Matthews v. Murchison*, 14 Abb. N. C. 512 n.

⁴ Sup'm. Ct. 1875, *Lawton v. Green*, 5 Hun, 157.

⁵ N. Y. Super. 1878, *Roberts v. White*, 43 Super. 455.

⁶ 1876, *Lawton v. Green*, 64 N. Y. 326.

⁷ Rule 30; Sup'm. Ct. Sp. T. 1850, *Griffings v. Slate*, 5 How. 205.

⁸ N. Y. Super. 1878, *Roberts v. White*, 43 Super. 455; Sup'm. Ct. Sp. T. 1873, *Nat. Bank v. Hibbard*, 45 How. 280.

⁹ Code Civ. Proc. § 623.

¹⁰ Code Civ. Proc. § 625.

CHAPTER III.

REFERENCES IN SUPPLEMENTARY PROCEEDINGS.

SECTION 1.—Order, form, and contents.

SECTION 2.—Proceedings before the referee.

§ 1. **The Order, Form, and Contents.**—A referee may be appointed to take the examination on proceedings supplementary to execution;¹ the appointment may be made at any stage of the proceedings, or any specific question may be referred. In the latter case the referee may be directed to report either the evidence or the facts.² Either party may be examined as a witness in his own behalf, and may produce and examine other witnesses as on the trial of an action. The examination must be under oath, and may be adjourned from time to time as the referee deems proper.³ Unless the oath be expressly waived the referee must be sworn, and the oath filed with the report or testimony.⁴ The examination is a special proceeding.⁵ The order can be reviewed only by the judge who made it or by the court.⁶ If the time and place of appearance are not fixed by the order the referee may issue his summons requiring such debtor to appear at a time and place named; failure to appear may be punished as a contempt.⁷ The order may direct the debtor to appear before a referee for examination, and before the judge on the Monday succeeding the close of the examination; failure so to appear is a contempt.⁸ Appearance before the referee and asking an adjournment, or submitting to examination without objection, is a waiver

¹ Code Civ. Proc. § 2442.

² Code Civ. Proc. § 2443.

³ Code Civ. Proc. § 2444.

⁴ Code Civ. Proc. § 2445.

⁵ Code Civ. Proc. § 2433.

⁶ Code Civ. Proc. § 2433.

⁷ Com. Pl. Sp. T. 1879, *Redmond v. Goldsmith*, 2 Law. Bul. 19.

⁸ Sup'm. Ct. 1878, *Sickles v. Hanley*, 4 Abb. N. C. 231.

of all save jurisdictional defects, in the proceedings.¹ If the judgment debtor is a resident, or has a regular place of business in this state, he cannot be compelled under any order or adjournment to attend at a place without the county or his place of business.² It will not be presumed that the court has lost jurisdiction by failure to adjourn from time to time.³

§ 2. **Proceedings on the Reference.**—The referee must be sworn, and the examination must be under oath.⁴ The reference is interlocutory, and the proceedings are similar to those upon other interlocutory references. Where the referee is ordered to take and report the evidence he must take all that is offered, he has no authority to pass upon objections thereto.⁵ He is to take, not to make, the examination, and should not act as prosecutor.⁶ He may adjourn the proceedings in the absence of either party, but to bring the judgment debtor into contempt notice of such adjournment must be personally served.⁷ Should the referee not be present at the time and place appointed, the judgment debtor is bound to wait a reasonable time, an hour, for him to appear.⁸ Upon failure of the debtor to appear the referee may file his report, and an order may be made thereon appointing a receiver of his property.⁹ The examination may be full and searching concerning the amount of the debtor's property, and any disposition he has made or attempted to make of it,¹⁰ how he acquired, and how he disposed of such property, are proper subjects of inquiry.¹¹ The proceeding is in the nature of a cross-exam-

¹ Sup'm. Ct. 1862, *Bingham v. Dishrow*, 37 Barb. 24; 14 Abb. 251; N. Y. Super. 1856, *Hobart v. Frost*, 12 Super. 672; 3 Abb. 119; Sup'm. Ct. 1857, *Dresser v. Van Pelt*, 15 How. 19; N. Y. Super. 1880, *Lehmair v. Griswold*, 46 Super. 11; N. Y. City Ct.

² Code Civ. Proc. § 2459.

³ *Wright v. Nostrand*, 94 N. Y. 34.

⁴ Code Civ. Proc. §§ 2444, 2445.

⁵ 1873, *Fox v. Moyer*, 54 N. Y. 125.

⁶ Com. Pl. Sp. T. 1877, *People v. Leipzig*, 52 How. 410.

⁷ Code Civ. Proc. § 2444; Sup'm. Ct. 1860, *Reynolds v. McElhone*, 20 How. 454.

⁸ Sup'm. Ct. 1860, *Reynolds v. McElhone*, 20 How. 454.

⁹ 1858, *Edmonston v. Loud*, 16 N. Y. 543.

¹⁰ Sup'm. Ct. 1868, *Forbes v. Willard*, 54 Barb. 520; 37 How. 193.

¹¹ Sup'm. Ct. 1868, *Forbes v. Willard*, 54 Barb. 520; 37 How. 193.

ination, and leading questions are proper;¹ the party cannot refuse to answer upon the ground that it will tend to convict him of a fraud, or to show he has been a party or privy to a fraudulent conveyance.² While a party cannot be allowed to make evidence by stating matters not called for, he may state so much as is necessary to enable the court to understand the matter inquired of.³ The party under examination is not entitled to cross-examination, but he may have the advice and instruction of counsel in framing his answers.⁴ Where it appears that the debtor has sold property at its full value, an inquiry as to whom, is immaterial; otherwise when it is sold for less than its value.⁵ A party may be allowed to explain his evidence after it is signed; but such explanations should be in the form of a supplementary statement former being left untouched.⁶ A witness cannot be compelled to subscribe to testimony erroneously taken, though supplemental corrections appear in the minutes.⁷ A party is not bound to answer questions which do not tend to show whether he is in possession of property which can be applied to the debt.⁸ Where during the examination it appears that the debtor has transferred property to a witness, such witness may be compelled to give full information touching such transfer and the consideration therefor.⁹ A witness cannot stop the examination by claiming to own the property; the creditor may show the purchase was not made in good faith.¹⁰ A third person indebted may be examined in aid of execution though the debt is not yet due.¹¹ The subpoena to a wit-

¹ Sup'm. Ct. Chamb. 1850, *Corning v. Tooker*, 5 How. 16; N. Y. Super. Sp. T. 1851, *Leroy v. Halsey*, 8 Super. 589.

² Code Civ. Proc. § 2460.

³ N. Y. Super. Sp. T. 1851, *Leroy v. Halsey*, 8 Super. 589.

⁴ Sup'm. Ct. Chamb. 1850, *Corning v. Tooker*, 5 How. 16.

⁵ Com. Pl. 1859, *Williams v. Carroll*, 2 Hilt. 438.

⁶ Sup'm. Ct. Chamb. 1850, *Corning v. Tooker*, 5 How. 16.

⁷ Sup'm. Ct. 1878, *Sherwood v. Dolen*, 14 Hun, 191.

⁸ Com. Pl. Sp. T. 1858, *Hurst v. Enoch*, 6 Abb. 212; Sup'm. Ct. 1851, *Van Wyck v. Bradley*, 3 Code R. 157.

⁹ 1869, *Lathrop v. Clapp*, 40 N. Y. 328.

¹⁰ Sup'm. Ct. 1882, *Mechanics' &c., Bank v. Healy*, 14 Week. Dig. 120.

¹¹ Sup'm. Ct. 1883, *Davis v. Jones*, 8 Civ. Proc. 43.

ness to attend should be under the hand of the referee, not of the court¹. He may make an order directing the judgment debtor to produce his books and papers.² It is in the option of the judgment creditor whether he will examine the debtor, or witnesses, or both.³ A person not a party cannot appear by counsel.⁴ The referee may adjourn the proceedings from time to time, even though the debtor refuses to consent thereto;⁵ but the creditor must proceed with reasonable diligence; he cannot adjourn indefinitely.⁶ Application for an adjournment or a stay should be made to the referee, not the court.⁷ After the examination is once closed the referee has no power to reopen it.⁸ The testimony of the witnesses must be signed by them and returned by the referee to the court with his report.⁹ The court does not lose jurisdiction by failure to adjourn regularly.¹⁰ The order of reference could, perhaps, be set aside, but only on motion of the judgment debtor.¹¹

¹ Sup'm. Ct. 1885, *People v. Ball*, 37 Hun, 245.

² Com. Pl. Sp. T. 1885, *Pruden v. Tallman*, 6 Civ. Proc. 360.

³ County Court, 1855, *Graves v. Lake*, 12 How. 33.

⁴ Sup'm. Ct. Sp. T. 1856, *Sanford v. Carr*, 2 Abb. 462.

⁵ Sup'm. Ct. 1877, *Kaufman v. Thrasher*, 10 Hun, 438.

⁶ Chancery, 1844, *Hudson v. Plets*, 11 Paige, 180.

⁷ Sup'm. Ct. 1862, *Mason v. Lee*, 23 How. 466.

⁸ Chancery, 1844, *Hudson v. Pletz*, 11 Paige, 180: Sup'm. Ct. Sp. T. 1856, *Orr's case*, 2 Abb. 457.

⁹ Rule 30.

¹⁰ 1883, *Wright v. Nostrand*, 94 N. Y. 41.

¹¹ Sup'm. Ct. 1877, *Underwood v. Sutcliffe*, 10 Hun, 453.

CHAPTER IV.

REFERENCES UNDER THE GENERAL ASSIGNMENT ACT OF 1877.

SECTION 1.—Reference under Section 21.

SECTION 2.—Reference of a disputed claim.

SECTION 3.—Reference to take and state the account.

SECTION 4.—Report of referee on the account.

§ 1. Reference under Section 21.—The county court may, at any time, on the petition of any party interested, order the examination of witnesses and the production of any books and papers before him, or before a referee appointed by him for such purpose, and the evidence so taken, together with the books and papers, or the extracts therefrom, shall be filed in the county clerk's office. No party or witness shall be excused from answering on the ground that the answer may tend to criminate him; but such answer cannot be used against him in any criminal action or proceeding.¹ Such examination is discretionary.² The judge must determine whether the application is made in good faith, and can allow it only in aid of, and not in hostility to the assignment;³ but the fact that the examination may develop evidence showing the assignment to be fraudulent is no reason for refusing the order.⁴ The order should provide that the examination of the books shall be under the control of the referee, and that the assignee or his rep-

¹ L. 1877, Ch. 466, § 21.

² 1885, Matter of Holbrook, 99 N. Y. 539; Sup'm. Ct. 1885, Matter of Kapelovich, 22 Week. Dig. 13.

³ Com. Pl. Sp. T. 1879, Matter of Burtnett, 8 Daly, 363; Com. Pl. 1882, Matter of Goldsmith, 15 Week. Dig. 110; Com. Pl. Sp. T. 1882,

Matter of Brown, 10 Daly, 115; Com. Pleas. 1882, Matter of Swezey, 64 How. 353; Com. Pl. Sp. T. 1881, Matter of Everit, 10 Daly, 99; 1885, Matter of Holbrook, 99 N. Y. 539.

⁴ Sup'm. Ct. 1885, Matter of Wilkinson, 36 Hun, 134.

representative may be present;¹ but such examination should not extend to an inquiry whether the preferences are fraudulent, what the assignors, prior to the assignment, did with borrowed money, or whether any act of theirs was fraudulent in fact or in law.² The referee is to take, not make the examination; if he exceeds his powers in this respect his report will be sent back for correction, and so much of the examination as was made by the referee will be stricken out.³ The examination cannot be had under this section to enable the assignee to prepare his schedules. For that purpose it must be had under Section 3 before the county judge.⁴ The proceedings under Section 21 are in the nature of a cross-examination; the debtor must discover his whole estate and effects as they were at the date of the assignment, and a witness if any is called, must answer every question put to him about the debtor's property, whatever the result may be to either.⁵ The object is the perpetuation of testimony, and the inspection of books and papers for use in any of the various proceedings that grow out of the administration of the assigned estate.⁶ Only the witnesses named in the order, and the books therein required to be produced, can be examined.⁷ The evidence taken is not to be reported to the court, but is to be certified by the referee and filed in the office of the county clerk, in New York city in the office of the clerk of the common pleas.⁸ There is no provision in the statute or elsewhere for any opinion or report of the referee; if any report is made or opinion rendered the report will be sent back, and the re-

¹ Com. Pl. Sp. T. 1885, *Matter of Rindskopf*, 13 Daly, 26.

² Com. Pl. Sp. T. 1885, *Matter of Rindskopf*, 13 Daly, 26; N. Y. City Ct. 1885, *Schneider v. Altman*, 8 Civ. Proc. 242.

³ Com. Pl. Sp. T. 1877, *People v. Leipzig*, 52 How. 410; Com. Pl. Sp. T. 1887, *Matter of Ives*, Daily Reg. Sept. 14, 1887.

⁴ L. 1877, Ch. 466, § 3; as amend-

ed. Com. Pl. Sp. T. 1887, *Matter of Ives*, Daily Reg. Sept. 14, 1887.

⁵ 1885, *Matter of Holbrook*, 99 N. Y. 539.

⁶ Com. Pl. Sp. T. 1879, *Matter of Boyce*, 10 Daly, 18; Com. Pl. Sp. T. 1887, *Matter of Ives*, Daily Reg. Sept. 14, 1887.

⁷ 1885, *Matter of Holbrook*, 99 N. Y. 539.

⁸ Com. Pl. Sp. T. 1887, *Matter of Ives*, Daily Reg. Sept. 14, 1887.

port and opinion ordered stricken out.¹ The order of procedure before the referee, and the manner of compelling obedience to his directions has already been discussed.² The form of the report is the same as in other cases to take and report evidence.³

§ 2. **Reference of Disputed Claim.**—A disputed claim arising under the provisions of the assignment act may be referred.⁴ The order may be to hear and determine.⁵ As to a claim so referred that is not in the schedules and contested by the assignee, the burden of proof is on the claimant.⁶ The referee in the accounting of the assignee may try a disputed claim if the order therefor was made without objection.⁷ The county court has all the powers of a court of equity as to references for its own information of questions arising under the act.⁸ The hearing is brought on in the same manner, and the proceedings before the referee are the same as in other special proceedings.⁹ Where the order was that the referee hear and determine a disputed claim his decision will not be reviewed at special term, but the parties will be left to their appeal.¹⁰

§ 3. **Reference to Take and State the Account.**—A referee may be appointed to take and state the account of an assignee for the benefit of creditors;¹¹ the appointment is matter of course in N. Y. Com. Pleas.¹² It was formerly held that such reference could not be ordered without a general citation to all the creditors,¹³ but under the act of 1878 (L. 1878, ch. 318), the contrary is held.¹⁴ The applica-

¹ Com. Pl. Sp. T. 1887, Matter of Ives, Daily Reg. Sept. 14, 1887.

² *Ante*, P. 111.

³ *Ante*, P. 106.

⁴ L. 1877, ch. 466. § 26 as am. by L. 1878, ch. 318, § 7.

⁵ Com. Pl. Sp. T. 1881, Matter of Fairchild, 10 Daly, 74.

⁶ Com. Pl. Sp. T. 1882, Matter of Jeselson, 10 Daly, 104.

⁷ Com. Pl. Sp. T. 1882, Matter of Jeselson, 10 Daly, 104.

⁸ Com. Pl. Sp. T. 1878, Matter of Bonner, 8 Daly, 75.

⁹ *Ante*, PP. 110, 111.

¹⁰ Com. Pl. Sp. T. 1881, Matter of Fairchild; 10 Daly, 74.

¹¹ L. 1877, ch. 466, § 20, Assignment Rule 23, N. Y. Com. Pleas.

¹² Rule 23, Com. Pleas, *supra*.

¹³ Com. Pl. 1878, Matter of Cotlow, 5 Abb. N. C. 301 n.; 1876, Bailey v. Byrne, 67 N. Y. 346.

¹⁴ Sup'm. Ct. 1881, Matter of Cowing, 26 Hun, 214.

tion for a general accounting may be made by petition of the assignee, any creditor, or surety of the assignee, or of the assignor for a general citation after one year from the date of the assignment.¹ Where the application is by a single creditor it should be for an order to show cause.² The supreme court has concurrent jurisdiction with the county courts in all matters arising under the act.³ The order should be to take and state the account.⁴ The referee must be sworn.⁵ He has authority to examine the parties and witnesses on oath in relation to the assignment and accounting, and all matters connected therewith, to compel their attendance for that purpose, their answers to questions, and the production of books and papers.⁶ The method of compelling such attendance, testimony, and the production of such books has already been treated herein.⁷ The assignee must in all cases file his account with vouchers.⁸ Except when otherwise expressly provided the procedure in the accounting will be the same as an accounting in an action.⁹ By special rule in New York city the account must be in the nature of a debit and credit statement, the debit side being the assets as shown in the schedule, and the credit the decrease therein, as well as expenses.¹⁰ The statement of expenditures must be full and complete, and must be accompanied with vouchers, save for trivial expenses.¹¹ What are trivial expenses has not been, and perhaps cannot be determined, and must be left somewhat to the discretion of the referee or to the court. The old chancery rule required vouchers for all payments exceeding twenty dollars where the sum of all such items did not exceed five hundred dollars.¹² The requirements of assign-

¹ L. 1877, ch. 466, § 11, as amended by L. 1878, ch. 318.

² Sup'm. Ct. 1881, *Matter of Cowling*, 26 Hun, 214.

³ L. 1885, p. 626, ch. 380.

⁴ Com. Pl. Sp. T. 1878, *Matter of Vilmar*, 10 Daly, 15; L. 1877, ch. 466, § 20, par. 3.

⁵ Com. Pl. Sp. T. 1878, *Matter of Vilmar*, 10 Daly, 15.

⁶ L. 1877, ch. 466, § 20, as amended by L. 1878, ch. 318.

⁷ *Ante*, P. 111.

⁸ Assignment Rule 23, Com. Pl.

⁹ *Ante*, P. 94.

¹⁰ Assignment Rule 25, Com. Pl.

¹¹ Assignment Rule 26, Com. Pl.; Rule 30.

¹² Chancery Rule 107, *ante*, p. 89.

ment rule 26 are more stringent than those of chancery rule 107. The affirmative on the accounting is with the assignee, and objections to the account may be presented to the referee in writing, or be brought out in cross-examination.¹ The testimony must be signed by the witnesses and attached to and filed with the report.² The assignee must prove that he has duly advertised for claims, under section 4, that notice to present claims was duly made and served, that citations have been issued to, and duly served upon creditors and parties interested in the fund, and who the creditors are.³ The referee has no power to cure failure of notice to present claims.⁴ When the order of reference authorizes him to fix the time when claims shall be presented, he may extend the time so fixed.⁵ The assignee must show the necessity for, and the reasonableness of the charges for expenses.⁶ The referee has no power to consider a claim against the assignee for conversion.⁷ Where directed by the order the referee may try a disputed claim.⁸

§ 4. **Report of Referee on the Account.**—The act nowhere prescribes the form of the referee's report on the accounting of the assignee. In the absence of directions to the contrary, the general form on a reference to take and state an account may be adopted;⁹ modified, of course, to meet the requirements of the assignment act. In New York city the rule of the court of common pleas requires that the report shall show all the jurisdictional facts necessary to confer power on the court, such as the proper executing and acknowledging the assignment, recording the same,

¹ Assignment Rule 27, Com. Pl.

⁵ Com. Pl. 1884, *Matter of Woodward*, 67 How. 359.

² Assignment Rule 28, Com. Pl.; Rule 30.

⁶ Com. Pl. Sp. T. 1879, *Matter of Manahan*, 10 Daly, 39; Com. Pl. Sp. T. 1880, *Matter of Johnson*, 10 Daly, 123.

³ Com. Pl. Sp. T. 1880, *Matter of Phillips*, 10 Daly 47; Com. Pl. 1878, *Matter of Dryer*, 10 Daly, 8; Com. Pl. Sp. T. 1880, *Matter of Schaller*, 10 Daly, 57.

⁷ Com. Pl. 1885, *Matter of Macklin*, 13 Daly, 105.

⁴ Com. Pl. Sp. T. 1880, *Matter of Schaller*, 10 Daly, 57.

⁸ Com. Pl. Sp. T. 1881, *Matter of Fairchild*, 10 Daly, 24.

⁹ Rule 85; *Ante*, pp. 94, 99.

filing of the schedules and bond, the advertising for creditors, the issuing of the citation, the presenting of the account; and where any items are disallowed, such items are to be fully set out.¹ The report of the referee to take and state the account must show whether the assignee duly advertised for claims under section 4, whether notice to present claims was duly made and served, whether citations have been issued to and served upon creditors and parties interested in the fund, who the creditors are, and who appeared on the return thereof.² If composition is made, the report must show whether all have signed; the original deed and release must be returned, as well as the evidence subscribed by the witnesses.³ The report must be filed and notice thereof given to creditors.⁴ Unless exceptions thereto are filed, the report will be confirmed of course.⁵ It may be confirmed on consent of the creditors.⁶ One who has moved at special term to confirm the report must be held to support it both in law and fact, although he has filed exceptions thereto.⁷ The referee cannot be compelled to file his report until his fees are paid.⁸ An assignee who has the funds of the estate in his hands must pay the fees of the referee on the final accounting of a retiring assignee;⁹ if the fees are objected to they must be taxed,¹⁰ at the statutory rate.¹¹ The fees are not limited to the time and labor actually spent in sittings and taking evidence;¹² but may charge for time necessarily spent in examining the

¹ Assignment Rule 29 Com. Pl.

² Com. Pl. Sp. T. 1880, Matter of Phillips, 10 Daly, 47; Com. Pl. 1878, Matter of Dryer, 10 Daly, 8; Com. Pl. Sp. T. 1880, Matter of Schaller, 10 Daly, 57.

³ Com. Pl. 1878, Matter of Dryer, 10 Daly, 8.

⁴ Com. Pl. Sp. T. 1878, Matter of Scheu, 10 Daly, 11.

⁵ Rule 30; Com. Pl. Sp. T. 1878, Matter of Scheu, 10 Daly, 11.

⁶ Com. Pl. Sp. T. 1878, Matter of Weinhaus, 5 Abb. N. C. 355.

⁷ Com. Pl. 1883, Matter of Potter, 10 Daly, 133.

⁸ Com. Pl. Sp. T. 1880, Matter of Elmore, 10 Daly, 48.

⁹ Com. Pl. Sp. T. 1880, Matter of Elmore, 10 Daly, 48.

¹⁰ Com. Pl. Sp. T. 1883, Matter of Johnson, 10 Daly, 123; Com. Pl. Sp. T. 1880, Matter of Schaller, 10 Daly, 57.

¹¹ Com. Pl. Sp. T. 1880, Matter of Schaller, 10 Daly, 57; Com. Pl. 1881, Matter of Fairchild, 10 Daly, 74.

¹² Com. Pl. Sp. T. 1881, Matter of Hulbert, 9 Abb. N. C. 132.

account.¹ The taxing officer must ascertain by affidavit and other evidence how much time and labor were actually devoted to the case.² Where no objections are made to the account, the duty of the referee is limited to ascertaining the jurisdictional facts, and ascertaining whether notice has been given to creditors. He can receive no fees for going beyond this, though some of the charges are suspicious.³ Where the assignee carries on the business of the assignor at a loss he must be charged with the value of the assets that came to his hands, and allowed the ordinary expenses of administering his trust.⁴ Exceptions to the report must be in writing, and must be specific.⁵

¹ Com. Pl. Sp. T. 1880, Matter of Schaller, 10 Daly, 57.

² Com. Pl. Sp. T. 1880, Matter of Schaller, 10 Daly, 57.

³ Com. Pl. Sp. T. 1885, Matter of May, 13 Daly, 24.

⁴ Com. Pl. 1885, Matter of Macklin, 13 Daly, 105.

⁵ Com. Pl. Sp. T. 1876, Levy's Accounting, 1 Abb. N. C. 177.



CHAPTER V.

REFERENCE OF A DISPUTED CLAIM AGAINST THE ESTATE OF A
DECEASED PERSON.

SECTION 1.—The order, and proceedings thereon.

SECTION 2.—Report of referee.

§ 1. **Order of Reference and Proceedings thereon.**—A claim against the estate of a deceased person that has been rejected by the executor or administrator may, by written consent of the parties, be referred to one or three disinterested persons approved by the surrogate. The agreement and approval of the surrogate must be filed in the office of the clerk of the supreme court in the county where the parties, or one of them, resides, and an order made referring the matter in controversy to the person or persons so selected.¹ The statute applies only to claims that existed against the deceased; it has no application to the claims of an executor for expenses incurred by him in the execution of his trust,² nor to the claim of an executor against the deceased.³ Equitable as well as legal claims may be referred;⁴ or a claim for a tort;⁵ or unliquidated claims of a surviving partner against his deceased partner;⁶ or of an endorser of promissory notes made by a firm, of which deceased was a member.⁷ The reference must be made, or an action on the claim begun, within six months after dispute or rejection.

¹ 2 R. S. P. 88, § 36.² N. Y. Surr. 1882, *Stewart v. O'Donnell*, 2 Dem. 17.³ 2 R. S. 88, § 33; Code Civ. Proc. § 2739; 1876, *Kyle v. Kyle*, 67 N. Y. 400; 1884, *Snyder v. Snyder*, 96 N. Y. 88.⁴ Sup'm. Ct. 1864, *White v. Story*, 28 How. 173.⁵ Sup'm. Ct. 1865, *Brockett v. Bush*, 18 Abb. 337.⁶ Sup'm. Ct. 1857, *Francisco v. Fitch*, 25 Barb. 130.⁷ 1886, *Matter of Gray*, 42 Hun, 411.

tion, or if not yet due within six months after it becomes due, otherwise it will be barred.¹ A notice of rejection duly signed by the attorneys of the personal representatives is sufficient;² in the absence of notice within a reasonable time it will be presumed the claim is allowed.³ The statute is penal in character, and must be strictly complied with. There must be an agreement in writing to refer, it must be filed, and an order entered; otherwise the court acquires no jurisdiction;⁴ it must name the referees, or authorize the court to do so, otherwise the court has no authority to make the appointment.⁵ A written consent endorsed on an order entitled in the surrogate's court, signed by the surrogate and entered by the clerk of the supreme court, has been held sufficient where the parties have proceeded before the referees therein named without objection.⁶ The agreement must state substantially the issue between the parties, alleging the claim on one side and the denial of its justice on the other; it is a substitute for the complaint and answer.⁷ The order should be entitled in the supreme court, but it will be held valid though entitled in the surrogate's court if the parties have proceeded thereunder without objection; in such case the order and consent may be entitled and filed now for then.⁸ The reference should be to hear and determine, and the proceedings are the same in all respects as upon a reference ordered by the court in an action.⁹ The reference is not an action, but a special proceeding;¹⁰ the referee may be directed to

¹ Code Civ. Proc. § 1822.

² 1875, *Selover v. Coe*, 63 N.Y. 438.

³ N. Y. Surr. 1881, *Underhill v. Newburger*, 4 Redf. 499; compare *Hoyt v. Bonnett*, 50 N. Y. 538.

⁴ Sup'm. Ct. 1892, *Bennett v. Gould*, 27 Hun, 366; Sup'm. Ct. 1868, *Bucklin v. Chapin*, 35 How. 155; Sup'm. Ct. Sp. T. 1851, *Comstock v. Olmstead*, 6 How. 77; Sup'm. Ct. 1832, *Robert v. Ditmas*, 7 Wend. 522.

⁵ N. Y. Surr. 1883, *Tilney v. Clendinning*, 1 Dem. 212.

⁶ Sup'm. Ct. 1868, *Bucklin v. Chapin*, 53 Barb. 488; 35 How. 155.

⁷ Sup'm. Ct. 1835, *Woodin v. Bagley*, 13 Wend. 453.

⁸ Sup'm. Ct. 1868, *Bucklin v. Chapin*, 53 Barb. 488; 35 How. 155.

⁹ 2 R. S. 89, §37; 1882, *Mowry v. Peet*, 88 N. Y. 453.

¹⁰ 1880, *Roe v. Boyle*, 81 N. Y. 305; Sup'm. Ct. 1880, *Young v. Cuddy*, 23 Hun. 249; 1882, *Mowry v. Peet*, 88 N. Y. 453; Sup'm. Ct. 1886, *Hatch v. Stewart*, 42 Hun, 164.

inquire into the claim of the estate against the claimant,¹ and may set off so much thereof as will defeat the claimant, but cannot give judgment as for a counter-claim for the excess.² After the executor has consented to refer he cannot object that the claim is not referable.³ Claimants having separate interests cannot unite in one reference.⁴ The referee possesses no equity powers,⁵ but he has jurisdiction to determine whether a creditor is entitled to share with the individual creditor of a deceased member of a firm, or whether he must await payment in full of partnership debts.⁶ The submission by consent of a non-referable claim against the estate of a decedent, is an arbitration, not a reference.⁷

§ 2. **Report of Referee.**—The provision of section 1019 of the code requiring a referee's report to be made within sixty days has no application to these proceedings,⁸ nor has that part of rule 30 that requires the testimony of witnesses to be signed by them and filed with the report.⁹ The report must contain findings of fact and conclusions of law separately stated,¹⁰ and may award costs¹¹ and disbursements.¹² The certificate of the referee that the administrator refused to refer is *prima facie* conclusive on the question of costs.¹³ Judgment can be entered on the report only

¹ Sup'm. Ct. 1879, Hendrickson v. Dickson, 19 Hun, 290; 1882, Mowry v. Peet, 88 N. Y. 453.

² 1882, Mowry v. Peet, 88 N. Y. 453; Sup'm. Ct. 1879, Hendrickson v. Dickson, 19 Hun, 290; Sup'm. Ct. 1887, Myers v. Cronk, 45 Hun, 401.

³ Sup'm. Ct. 1875, Weller v. Weller, 4 Hun, 195.

⁴ Sup'm. Ct. 1887, Myers v. Cronk, 45 Hun, 401.

⁵ Sup'm. Ct. 1887, Myers v. Cronk, 45 Hun, 401.

⁶ Sup'm. Ct. 1886, Matter of Gray, 42 Hun, 411.

⁷ Sup'm. Ct. Sp. T. 1864, Godding v. Porter, 17 Abb. 374; Sup'm.

Ct. Sp. T. 1858, Akely v. Akely, 17 How. 21.

⁸ Sup'm. Ct. Sp. T. 1864, Godding v. Porter, 17 Abb. 374.

⁹ Sup'm. Ct. 1876, Kellogg v. Werner, 6 Hun, 452.

¹⁰ 2 R. S. p. 89, § 37.

¹¹ Sup'm. Ct. Sp. T. 1884, Hearn v. Sullivan, 13 Abb. N. C. 371; Sup'm. Ct. 1886, Krill v. Brownell, 40 Hun, 72.

¹² Sup'm. Ct. 1886, Krill v. Brownell, 40 Hun, 72; 1886, Larkin v. Maxson, 103 N. Y. 680; Sup'm. Ct. 1886, Hatch v. Stewart, 42 Hun, 164,

¹³ Sup'm. Ct. 1886, Ely v. Taylor, 42 Hun, 205.

on confirmation by the court.¹ A judgment entered without such confirmation is void.² The jurisdiction of the referee may be questioned on the motion to confirm.³ To secure a review of the report on appeal, confirmation must be opposed or a motion to set it aside made at special term.⁴ A report, regular on its face, is sufficient to require its formal confirmation.⁵ It may be set aside on motion made at special term.⁶ As a foundation for such motion a case must be made and settled,⁷ but the making of a case is unnecessary where the moving papers show the matter was not referable under the statute.⁸ The motion may be made after judgment,⁹ on the motion to confirm, judgment contrary thereto cannot be ordered.¹⁰ The report may be reviewed by appeal from the judgment,¹¹ without moving at special term to set aside the report,¹² but the proper practice is to appeal from the order confirming the report.¹³ When the report is confirmed by consent, no appeal from the judgment entered thereon can be taken.¹⁴ On reversal of the judgment the court may discharge the referee, and order a reference to a referee of its own selection.¹⁵ After the report is confirmed it is binding on the surrogate's court, and can be reviewed only by appeal.¹⁶

¹ Sup'm. Ct. 1857, *Boyd v. Bigelow*, 14 How. 511; Sup'm Ct. Sp. T. 1853, *Avery v. Smith*; 9 How. 349.

² Sup'm. Ct. 1882, *Burnett v. Jones*, 27 Hun, 366; Sup'm. Ct. Sp. T. 1851, *Comstock v. Olmstead*, 6 How. 77; Sup'm. Ct. 1861, *Coe v. Coe*, 37 Barb. 232.

³ Sup'm. Ct. Sp. T. *Godding v. Porter*, 17 Abb. 374.

⁴ 1875, *Smith v. Velie*, 60 N.Y. 106.

⁵ Sup'm. Ct. 1877, *Somerville v. Work*, 9 Hun, 664.

⁶ 2 R. S. 89, § 37; Sup'm. Ct. 1882, *Schreyer v. Holborrow*, 26 Hun, 468.

⁷ Sup'm. Ct. 1877, *Somerville v. Work*, 9 Hun, 664; Sup'm Ct. 1880, *Young v. Cuddy*, 23 Hun, 249.

⁸ Sup'm. Ct. Sp. T. 1864, *Godding v. Porter*, 17 Abb. 374.

⁹ Sup'm. Ct. 1882, *Schreyer v. Holborrow*, 63 How. 228.

¹⁰ Sup'm. Ct. 1880, *Young v. Cuddy*, 23 Hun, 249; Sup'm. Ct. 1861, *Coe v. Coe*, 37 Barb. 232; 4 Abb. 86.

¹¹ Sup'm. Ct. 1861, *Coe v. Coe*, 37 Barb. 232; 1880, *Roe v. Boyle*, 81 N. Y. 305; Sup'm. Ct. 1880, *Young v. Cuddy*, 23 Hun, 249.

¹² Sup'm. Ct. 1881, *Kellogg v. Clark*, 23 Hun, 393.

¹³ Sup'm. Ct. 1886, *Hatch v. Stewart*, 42 Hun, 164.

¹⁴ Sup'm. Ct. 1879, *Frame v. Vantine*, 16 Hun, 528; 1875, *Smith v. Velie*, 60 N. Y. 106; Sup'm. Ct. 1881, *Kellogg v. Clark*, 23 Hun, 393.

¹⁵ Sup'm. Ct. 1879, *Mastin v. Budington*, 18 Hun, 105.

¹⁶ Sup'm. Ct. 1886, *Matter of Gray*, 42 Hun, 411.

CHAPTER VI.

REFERENCES IN THE SURROGATE'S COURT.

SECTION 1.—When ordered.

SECTION 2.—Proceedings on the reference.

SECTION 3.—Report of referee.

§ 1. **When Ordered.**—Since the adoption of the code of civil procedure the power of a surrogate to order a reference is similar to, and almost co-extensive with that possessed by other courts of record.¹ The referee must possess the same qualifications as those appointed in other courts;² a clerk or other person employed in any capacity in a surrogate's office shall not act as appraiser, as attorney, or counsel, or as referee, or special guardian in any matter before the surrogate.³ But the stenographer of the court is not within the provisions of this section, or of section 90 of the code of civil procedure.⁴ The court may order a reference for its own information;⁵ the proceedings thereon are similar to those ordered for the same purpose in other courts.⁶ Where any material and necessary witness in a special proceeding before the surrogate, except a subscribing witness to a will, is so aged, sick, or infirm as to be unable to attend before the surrogate to be examined, and in any other case, the surrogate may, in his discretion, appoint a referee to proceed to the place where the witness is, whether in his own or an adjoining county, and take the examination of such witness as in open court. Such notice of the time and place of examination as the surro-

¹ Code Civ. Proc. § 2546.

² *Ante*, pp. 6, 7.

³ Code Civ. Proc. § 2511.

⁴ N. Y. Surr. 1885, *Benedict v. Cooper*, 3 Dem.362; 2 How. N. S. 38.

⁵ 1881, *Kearney v. McKeon*, 85 N. Y. 136; N. Y. Surr. 1877, *Taylor v. Bentley*, 3 Redf. 34.

⁶ *Ante*, pp. 82, 86.

one who has failed to appear as required by the citation.¹ A referee may be appointed to take the examination of a person alleged to have withheld property of a decedent from an executor or administrator which he ought to deliver to him.² The referee on such proceeding possesses the same power as the surrogate to punish a refusal to be sworn, or to answer a proper question.³ That a referee appointed by the surrogate is called an auditor does not vitiate the order.⁴ The appointment is made in the same manner as in other courts.⁵ The general rules of practice apply.⁶ A referee appointed in a special proceeding in the surrogate's court, other than one instituted for the probate or revocation of probate of a will, has the same power, and is entitled to the same compensation as a referee of the issues in an action in the supreme court;⁷ as to the powers of a referee of the issues, see *ante*, P. 32, *et seq.*; compensation, *ante*, P. 62. The report of the referee is not conclusive, but is subject to confirmation by the surrogate.⁸ On the written consent of all the parties appearing in a probate case, the surrogate may appoint a referee, or may, in his discretion, direct an assistant to take and report the testimony; but without authority to pass upon the issues involved therein.⁹ In a special proceeding, other than for the probate or the revocation of probate of a will, the surrogate may appoint a referee to take and report the evidence upon the facts, or upon a specific question of fact;¹⁰ and in a probate case, upon written consent of all the parties appearing, may appoint a referee, or in his discretion may direct an assistant to take and report the testimony, but without authority to pass on the issues involved.¹¹ So where proceedings to set aside a will are invalid because no guardian *ad litem* was appointed for an infant, a referee shall direct must be given to each other party, except

¹ Code Civ. Proc. §§ 2539, 2540.

² Code Civ. Proc. §§ 2706, 2707.

³ Code Civ. Proc. § 2710.

⁴ 1877, *Buchan v. Rintoul*, 70 N. Y. 1.

⁵ *Ante*, pp. 9, 10.

⁶ N. Y. Surr. 1882, *Chatfield v. Hewlett*, 2 Dem. 191.

⁷ Code Civ. Proc. § 2546.

⁸ Code Civ. Proc. § 2546.

⁹ Code Civ. Proc. § 2546.

¹⁰ Code Civ. Proc. § 2546.

¹¹ Code Civ. Proc. § 2546.

ence may be ordered to ascertain whether it would be for the benefit of the infant to have the will set aside.¹ On a motion for a substitution, a reference may be ordered to ascertain what would be a reasonable compensation to the retiring attorney.² An account rendered may be sent to a referee to hear and determine all questions arising on the settlement thereof.³ Any party may contest the account as to a matter affecting his interest in the settlement and distribution of the estate.⁴ To enable the party to make such contest, objections should be filed; they may be stated in general language;⁵ but must be sufficiently definite to point out the precise question intended to be raised.⁶ In New York City the objections must be specific; a copy must be served on the accounting party or his attorney, if he has appeared by attorney, within eight days after filing the account, and if it satisfactorily appears to the referee, by affidavit or petition, that an examination of the accounting party is necessary, it will be ordered.⁷ Before the adoption of Section 2533, Code of Civ. Proc., and Rule VII. N. Y. Surr. Ct., it was held in many well considered cases that the filing of any notice that generally or specifically denies the correctness of the account, raises an issue.⁸ Whether the objections filed are sufficiently specific must be determined by the circumstances of each case.⁹ An examination of an executor may be had before a referee, whether objec-

¹ N. Y. Surr. 1885, *Benedict v. Cooper*, 3 Dem. 362; 2 How. N. S. 38.

² N. Y. Surr. 1882, *Chatfield v. Hewlett*, 2 Dem. 191.

³ Code Civ. Proc. § 2546; 1877, *Buchan v. Rintoul*, 70 N. Y. 1.

⁴ Code Civ. Proc. §§ 2730, 2810; 1877, *Buchan v. Rintoul*, 70 N. Y. 1.

⁵ N. Y. Surr. 1879, *Matter of Hall*, 7 Abb. N. C. 149.

⁶ Code Civ. Proc. § 2533; Rule VII, N. Y. Surr.; N. Y. Surr. 1885, *Robert v. Morgan*, 4 Dem. 148; N.

Y. Surr. 1886, *Frame v. Willets*, 4 Dem. 368S; up'm. Ct. 1874, *Bainbridge v. McCullogh*, 1 Hun, 488.

⁷ Rule VII. N. Y. Surrogate's Court.

⁸ N. Y. Surr. 1879, *Matter of Hall*, 7 Abb. N. C. 149; *Steuben Co. Surr. 1872, Larrou v. Larrou*, 2 Redf. 69; 1874, *Peck v. Sherwood*, 56 N. Y. 615.

⁹ N. Y. Surr. 1882, *Thompson v. Mott*, 1 Dem. 32; N. Y. Surr. 1885, *Henry v. Henry*, 3 Dem. 322; 1 How. N. S. 297.

tions have been filed to the account or not;¹ or to enable a party to frame his objections to the account.²

§ 2. **Proceedings on the Reference.**—Neither the code nor the general rules contain any provisions for bringing on the hearing in references in this court. It has been held that the general rules of practice apply,³ and the same notice would be required as in reference to a master under the old chancery practice.⁴ Under that practice, the master, on receiving the decree, or order, assigned a day and place of hearing, and gave to the party bringing the decree, or order, to be served on the adverse party, a summons to attend at the time and place named. The length of notice was discretionary, not less than two days being required where the solicitor for the parties resided in the town or city where hearing was to take place, four days where he resided sixty miles distant, and a proportionate time for other distances.⁵ When an account is referred, a creditor, or person interested, though not cited, may appear and contest the account,⁶ and may be represented by counsel who may examine the accounting party.⁷ An allegation by any person that he is a creditor, is sufficient to entitle him to the right to appear, and this whether he has presented his claim or not.⁸ When an infant is cited, a special guardian must be appointed, although he has a general guardian.⁹ If the adverse parties fail to appear after being duly cited, the accounting parties may proceed *ex parte*;¹⁰ the verified account, and vouchers filed, are *prima facie* evidence in favor of the accounting party,¹¹ but not conclu-

¹ Code Civ. Proc. § 2735; *Geer v. Ransom*, 5 Redf. 578.

² N. Y. Surr. 1879, *Matter of Hall*, 7 Abb. N. C. 149; Rule VII, N. Y. Surr.; N. Y. Surr. 1878, *Matter of Douglass*, 3 Redf. 538.

³ N. Y. Surr. 1882, *Chatfield v. Hewlett*, 2 Dem. 191.

⁴ Rule 85.

⁵ Chancery Rule 100, *ante*, p. 85.

⁶ Code Civ. Proc. § 2731; N. Y. Surr. 1862, *Greene v. Day*, 1 Dem. 45.

⁷ N. Y. Surr. 1877, *Matter of Rich*, 3 Redf. 177.

⁸ N. Y. Surr. 1882, *Greene v. Day*, 1 Dem. 45.

⁹ N. Y. Surr. 1878, *Gunning v. Lockman*, 3 Redf. 273.

¹⁰ Chancery, 1833, *Kettell v. Rathbone*, 4 Paige, 102.

¹¹ N. Y. Surr. 1882, *Estate of Austin*, 3 Law Bul. 78; N. Y. Surr. 1880, *Valentine v. Valentine*, 4 Redf. 265; Sup'm. Ct. 1865, *Lansing v. Lansing*, 45 Barb. 182; 31 How. 55; Sup'm. Ct. 1874, *Bainbridge v. McCullough*, 3 T. & C. 486; 1 Hun, 488.

sive;¹ they are sufficient to throw the burden of proof on the contesting party.² The accounting party may be examined on oath touching his receipts and disbursements, or any other matter relating to the administration of the estate,³ and this whether formal exceptions have been filed or not.⁴ In the city of New York, when the account has been referred, the contest will be confined to the matters objected to;⁵ on such examination the accounting party may be compelled to disclose the assets of a firm of which he and deceased were members, although the accounts of the firm are unsettled.⁶ It is immaterial whether such accounting be intermediate or final.⁷ Production of books and papers may be compelled to show what those assets were.⁸ When disputed accounts are referred, the referee can pass only upon those to which objection is made. If the objections are insufficient leave may be granted to file new ones.⁹ Legal and equitable claims may be investigated.¹⁰ The mere fact that the executor or trustee has, in his account charged himself with sums of money does not estop him from saying he is not properly chargeable therewith.¹¹ A referee appointed under section 2546 possesses all the powers of a referee appointed by the supreme court for the trial of issues of fact in an action.¹² These powers have already been discussed.¹³ The proceedings on taking and stating an account are the same as in a similar proceeding in the supreme court.¹⁴

¹ 1874, *Peck v. Sherwood*, 56 N. Y. 615.

² *Kings Co. Surr.* 1881, *Carroll v. Hughes*, 5 Redf. 337; N. Y. Surr. 1880, *Estate of Lilienthal*, 2 Law Bul. 98; N. Y. Surr. 1880, *Valentine v. Valentine*, 4 Redf. 265; 1878, *Boughton v. Flint*, 74 N. Y. 476.

³ Code Civ. Proc. § 2735; N. Y. Surr. 1879, *Matter of Hall*, 7 Abb. N. C. 149.

⁴ N. Y. Surr. 1882, *Geer v. Ransom*, 5 Redf. 578.

⁵ Rule VII, N. Y. Surr.

⁶ N. Y. Surr. 1866, *Matter of Stouvenel*, 1 Tuck. 241; Sup'm.

Ct. 1863, *Woodruff v. Woodruff*, 17 Abb. 165.

⁷ Sup'm. Ct. 1863, *Woodruff v. Woodruff*, 17 Abb. 165.

⁸ N. Y. Surr. 1866, *Matter of Stouvenel*, 1 Tuck. 241.

⁹ 1878, *Boughton v. Flint*, 74 N. Y. 476.

¹⁰ 1878, *Boughton v. Flint*, 74 N. Y. 476; N. Y. Surr. 1854, *Upson v. Badeau*, 3 Bradf. 13.

¹¹ N. Y. Surr. 1877, *Matter of Pollock*, 3 Redf. 100.

¹² Code Civ. Proc. §§ 1018, 2546.

¹³ *Ante*, pp. 34, 40. *et seq.*

¹⁴ *Ante*, p. 94.

§ 3. **Report of Referee.**—The form of the report is nowhere prescribed by the code nor by the general rules of practice, and the rules of the old court of chancery apply.¹ The report must contain the title of the cause, must be addressed to the surrogate, must recite the substance of the order of reference, and must note the appearances before him.² It is usually divided into two parts, the body and the schedules. The body is an epitome of the proceedings, with his findings and conclusions thereon, and refers to the schedules for detailed particulars.³ The testimony must be filed with the report,⁴ but in references under section 2546 such testimony need not be signed by the witnesses.⁵ Where findings of fact and conclusions of law are made, they should be stated separately.⁶ The provision requiring the report to be filed within sixty days has no application to special proceedings.⁷ The referee is not bound to file his report until his fees are paid,⁸ nor has the surrogate power to compel any one to pay the fees and take up the report, but if the referee shall file it without payment, provision may be made in the final decree for the payment thereof by the parties chargeable therewith, or if any party shall pay them, the final decree may contain a provision for his reimbursement.⁹ The report should be confined to the matters referred to by the order.¹⁰ In New York city it will be confirmed as of course, unless exceptions thereto are filed within eight days after written notice of such filing, and copy of the report.¹¹ Until confirmed it is not presumptive evidence of the matters therein set forth.¹² The surrogate may send back the case for a further report, and the referee may make a further report on the evidence

¹ Rule 85.

² 1 Barb. Ch. Pr. [548.]

³ 1 Barb. Ch. Pr. [548].

⁴ Rule 30.

⁵ N. Y. Surr. 1885, Matter of Russell, 3 Dem. 377.

⁶ Code Civ. Proc. § 1022. See p. 54, *ante*.

⁷ Sup'm Ct. Sp. T. 1864, Godding v. Porter, 17 Abb. 374.

⁸ N. Y. Surr. 1878, Matter of Foster, 3 Redf. 532.

⁹ N. Y. Surr. 1885, Matter of Kraus, 4 Dem. 217. Compare Matter of Foster, 3 Redf. 532.

¹⁰ Sup'm Ct. Sp. T. 1867, Herforth v. Herforth, 2 Abb. N. S. 483.

¹¹ Rule VIII, N. Y. Surr.; Rule 30.

¹² N. Y. Surr. 1879, Estate of McEvoy, 1 Law Bul. 64.

already taken.¹ The report on a reference to take evidence and report with his opinion what compensation should be paid to an attorney on giving a substitution may be accepted in whole or in part, or altogether disregarded by the court.²

CHAPTER VII.

SPECIAL PROCEEDINGS IN VARIOUS MATTERS.

SECTION 1.—Sale or mortgage of real estate of infant or lunatic.

SECTION 2.—Proceedings to discover death of life tenant.

SECTION 3.—Reference on appeal from commissioners of highways.

SECTION 4.—Reference of controversy by trustees of insolvent debtors.

SECTION 5.—Reference on voluntary dissolution of corporations.

SECTION 6.—Reference of controversy by receivers of corporations.

SECTION 7.—Reference of controversy by receivers of insolvent mutual insurance companies.

SECTION 8.—Reference under the state banking act.

§ 1. **Sale or Mortgage of the Real Estate of an Infant or Lunatic.**—Upon the presentation of a petition for the mortgage or sale of the real estate of an infant or lunatic, a referee must be appointed to inquire into the merits of the application.³ The word “must” is imperative; the proceedings are void if a reference is omitted,⁴ although it was formerly held in a matter arising under the revised statutes that the court had power, in a clear case, to proceed summarily without a reference.⁵ The referee must inquire into the truth of the matters alleged in the petition, and must hear

¹ 1875, *Abercrombie v. Holder*, 63 N. Y. 628.

² N. Y. Surr. 1882, *Chatfield v. Hewlett*, 2 Dem. 191.

³ Code Civ. Proc. § 2354.

⁴ 1878, *Matter of Valentine*, 72 N. Y. 184; 1875, *Battell v. Torrey*, 65 N. Y. 294.

⁵ Sup'm. Ct. 1862, *Matter of McIlvaine*, 15 Abb. 91.

the allegation and proofs of all persons interested ;¹ special reasons must be shown for authorizing the sale.² That the income will be increased is not enough ;³ that the property is held in common, and is of small value compared with the expense of partition is.⁴ The order must be made at special term, not at chambers.⁵ When the proceedings are taken for the purpose of paying debts the referee should be directed to ascertain the amount of such debts, and any other facts necessary or proper on the application.⁶ The facts must be proved by two disinterested persons besides the petitioner.⁷ The testimony must be signed by the witnesses and filed with the report.⁸ The order should direct the referee to ascertain whether a sale, mortgage, or lease of any, and what portion of the premises would be beneficial, and why, and whether the person in whose behalf such petition is presented is in absolute need of such sale, etc., for the purpose provided in section 2348 of the code, in addition to what he can earn by his own exertions, and also the value of the property or interest to be disposed of, specifically as to each separate lot or parcel, whether any one has an adverse interest, or life estate in the property, and the terms and conditions on which it should be sold.⁹ The report must not refer to the petition or any other paper for a statement of fact ;¹⁰ it must state facts and conclusions, and not refer to the evidence for such statement.¹¹ The general form of the report is the same as in other special proceedings.¹²

§ 2. **Proceedings to discover Death of Life Tenant.**—A referee may be appointed to take the proofs and allegations of the parties in proceedings to discover the death of the tenant

¹ Code Civ. Proc. § 2354.

² Chancery, 1824, *Matter of Mason*, Hopk. 122; Chancery, 1846, *Matter of Jones*, 2 Barb. Ch. 22.

³ *Matter of Jones*, 2 Barb. ch. 22.

⁴ Chancery 1831, *Matter of Congdon*, 2 Paige, 566.

⁵ Sup'm. Ct. Sp. T. 1856, *Matter of Bookhout*, 21 Barb. 348.

⁶ Rule 56; Sup'm. Ct. 1880, *Matter of Lampman*, 22 Hun, 239.

⁷ Rule 56.

⁸ Rule 30.

⁹ Rule 56.

¹⁰ Rule 56.

¹¹ Sup'm. Ct. 1880, *Matter of Lampman*, 22 Hun, 239.

¹² *Ante*, p. 112.

for life.¹ A certified copy of the order requiring the production of the life tenant, and appointing the referee, must be served upon the person required to make the production, or his attorney, at least fourteen days before the time fixed for the hearing.² The referee has the same powers, and is entitled to the same compensation as a referee appointed for the trial of an issue in an action.³ The general form of the report is the same as in other special proceedings,⁴ must contain the conclusions of the referee upon the questions controverted before him,⁵ the proofs in the form of depositions respecting the identity of the person so produced with the person whose death is in question ; or, if no person is so produced, upon the question whether the person is living,⁶ and must be delivered to the petitioner, or filed with the clerk within ten days after the case is closed.⁷

§ 3. **Reference on Appeal from Determination of the Commissioners of Highways.**—On appeal from the determination of the commissioners of highways the county judge, or in case of his residence in the town, or his interest in the land through which the road shall be laid out, or in case he is of kin to any of the persons interested in said lands, or in case of his disability for any cause, then one of the justices of the sessions shall, after sixty days after the determination of said commissioners has been filed with the clerk, in writing appoint three disinterested free-holders who shall not have been named by parties interested in the appeal, and who shall be residents of the county, but not of the town where the road shall be located, as referees to hear and determine all the appeals that may have been brought within said sixty days ; shall notify them of their appointment, and deliver to them all papers connected with the matter.⁸ Any party aggrieved may appeal from the decision of the commissioners in laying out a road ;⁹ so may

¹ Code Civ. Proc. § 2305.

² Code Civ. Proc. § 2306.

³ Code Civ. Proc. § 2306 ; *ante*, pp. 32, 62.

⁴ P. 112, *ante*.

⁵ Code Civ. Proc. § 2308.

⁶ Code Civ. Proc. § 2308.

⁷ Code Civ. Proc. § 2308.

⁸ L. 1847, Ch. 455, § 8.

⁹ Sup'm. Ct. 1880, *People v. Supervisors*, 20 Hun, 196 ; 85 N. Y. 641.

any resident and tax-payer liable to assessment for his highway labor.¹ The referees so appointed possess all the powers and discharge all the duties heretofore held and discharged by three judges of the common pleas in similar cases.² They have no power and can perform no duties beyond those expressly conferred, and such incidental ones as are necessary to discharge the functions of their office.³ They have no authority to pass upon the jurisdiction of the commissioners; their power is limited to an examination of the case on its merits.⁴ Before proceeding to hear the appeals the referees must be sworn by some officer authorized to take affidavits to be read in courts of record, faithfully to hear and determine the matters referred to them.⁵ They must proceed to hear the appeal as soon as convenient, and where the determination appealed from was against an application for laying out, altering, or discontinuing a road, notice must be given to the commissioners by whom such determination was made. Where it is from a determination in favor of laying out, altering or discontinuing, the notice must be given to the commissioners, and to one or more of the applicants. The notice must specify the time and place where the appeal will be heard;⁶ must be served at least eight days before the date of hearing by delivering the same to one of the commissioners whose determination is appealed from, or by leaving the same at his dwelling house; and if directed to an applicant must be served in the same way.⁷ Where there are two appeals from different commissioners in reference to the same road the same referees may be appointed by one order to hear both appeals.⁸ These are special proceedings;⁹ the ref-

¹ Sup'm. Ct. 1862, *People v. Cor-telyou*, 36 Barb. 164.

² L. 1847, Ch. 455, § 8; Sup'm. Ct. 1863, *People v. Ferris*, 27 How. 193.

³ Sup'm. Ct. 1863, *People v. Ferris*, 27 How. 193.

⁴ Sup'm. Ct. 1862, *People v. Cor-telyou*, 36 Barb. 164; 1875, *People v. Harris*, 63 N. Y. 391; Sup'm. Ct. 1804, *Lawton v. Commissioners*, 2 Cal. 179. Sup'm. Ct. 1835, *Commis-*

sioners v. Judges, 13 Wend. 432; Sup'm. Ct. 1878, *People v. Sherman*, 15 Hun, 575.

⁵ L. 1847, Ch. 455, § 8.

⁶ 1 R. S. 518, § 87; 1875, *People v. Burton*, 65 N. Y. 452.

⁷ 1 R. S. P. 519, § 88.

⁸ 1873, *People v. Kniskern*, 54 N. Y. 52.

⁹ Sup'm. Ct. Chamb. 1857, *People v. Flake*, 14 How. 527.

erees become, for the time being, a court of inferior jurisdiction,¹ and may meet outside the town in which the proposed road lies.² They do not sit to review the evidence or proceedings before the commissioners, but to hear all the evidence anew.³ The whole merits of the case, and the fitness or the unfitness of the alteration are before them;⁴ and they may hear and decide as well on facts shown on the hearing before them as on those existing at the time of making application to the commissioners.⁵ If they refuse to execute their trust, and dismiss the appeal on a preliminary objection, mandamus will lie to compel them to proceed.⁶ Where the appeal is from an order discontinuing a road, the burden is on the respondent to show such road is useless, and unnecessary;⁷ any evidence tending to show that the road in question is not, nor ever can become a highway, or any other jurisdictional fact may be properly received.⁸ The referees may issue process to compel the attendance of witnesses, and may adjourn from time to time when necessary.⁹ Their decision, or that of any two of them must be in writing, must be signed by those making it, must be filed by them in the office of the town clerk of the town, who shall record the same, and shall be conclusive in the premises.¹⁰ They may affirm in part, and reverse in part;¹¹ but whether after reversing a determination not to lay out a highway, they have a right to inquire into the jurisdictional facts that lay at the bottom of the proceeding *quere*.¹² If they reverse the decision

¹ Sup'm. Ct. 1857, *People v. Flake*, 14 How. 527.

² Sup'm. Ct. 1882, *People v. Strevel*, 27 Hun, 218.

³ 1879, *Rector v. Clark*, 78 N. Y. 21; 1851, *People v. Goodwin*, 5 N. Y. 568; 1875, *People v. Harris*, 63 N. Y. 391.

⁴ 1851, *People v. Goodwin*, 5 N. Y. 568; 1875, *People v. Harris*, 63 N. Y. 391.

⁵ 1851, *People v. Goodwin*, 5 N. Y. 568; Sup'm. Ct. 1862, *People v. Albright*, 14 Abb. 305.

⁶ Sup'm. Ct. 1862, *People v. Cortelyou*, 36 Barb. 164.

⁷ 1873, *People v. Nichols*, 51 N. Y. 470.

⁸ Sup'm. Ct. 1860, *People v. Van Alstyne*, 32 Barb. 131.

⁹ 1 R. S. P. 519, § 89.

¹⁰ 1 R. S. P. 519, § 89.

¹¹ Sup'm. Ct. 1856, *People v. Baker*, 19 Barb. 240; Sup'm. Ct. 1880, *People v. Supervisors*, 20 Hun, 196, 85 N. Y. 641.

¹² 1875, *People v. Harris*, 63 N. Y. 391.

of the commissioners refusing to lay out a road, they may make such order in reference thereto as in their opinion the commissioners should have made;¹ and must proceed and lay out the road applied for.² Notice of laying out must be given to the parties interested; notice of hearing the appeal is not sufficient.³ With the written consent of the owner they may lay out the road through enclosed, improved, or cultivated land, though no certificate from twelve freeholders that such road is necessary has been made.⁴ Strict technical exactness is not jurisdictional, and the judgment of the referees will not generally be interfered with if they exercise a reasonable discretion.⁵ In discontinuing a highway they may leave the road abutting on private property.⁶ After the hearing is closed, and the case is finally submitted for decision, it cannot be re-opened to receive further testimony on the merits;⁷ but where by accident or mistake a party has been denied a hearing, the cause may be re-opened and further evidence taken.⁸ Where the referees reverse the order of the commissioners, and direct them to proceed and lay out the highway, their power is exhausted; they have no power thereafter to proceed and lay it out.⁹ After they affirm the order of the commissioners they have no duty to perform other than to make and file their report.¹⁰ Where the appeal was from a refusal to lay out a road, the report must show that all met to deliberate, or had notice;¹¹ but where the appeal was from the laying out of the road, the report

¹ Sup'm. Ct. 1863, *People v. Albright*, 14 Abb. 305; 1853, *People v. Commissioners*, 8 N.Y. 476; Sup'm. Ct. Chamb. 1857, *People v. Flake*, 14 How. 527.

² 1875, *People v. Harris*, 63 N. Y. 391.

³ 1873, *People v. Kniskern*, 54 N. Y. 52.

⁴ Sup'm. Ct. 1882, *People v. Strevell*, 27 Hun, 218.

⁵ Sup'm. Ct. 1862, *People v. Albright*, 14 Abb. 305; Sup'm. Ct. 1840, *Hallock v. Woolsey*, 23 Wend.

328; Sup'm. Ct. 1840, *People v. Judges*, 23 Wend. 360; Sup'm. Ct. 1860, *People v. Taylor*, 34 Barb. 481.

⁶ 1873, *People v. Nichols*, 51 N. Y. 470.

⁷ Sup'm. Ct. 1863, *People v. Ferris*, 27 How. 193.

⁸ Sup'm. Ct. 1863, *People v. Ferris*, 27 How. 193.

⁹ Sup'm. Ct. Sp. T. 1854, *Rogers v. Runyon*, 9 How. 248.

¹⁰ 1875, *People v. Harris*, 63 N. Y. 391.

¹¹ 1875, *People v. Burton*, 65 N. Y. 452.

need not show that all met or were notified.¹ Signature of the decision by any two is sufficient;² their decision is not reviewable.³ The fees of the referees are two dollars per day for each day employed in the hearing and decision, to be paid by the party appealing where the decision of the commissioners is confirmed, and is a county charge where their decision is reversed.⁴ Only the amount allowed by statute can be charged.⁵ The affirmance of the decision of the commissioners gives a *prima facie* right to fees, and such right is not suspended by *certiorari* to review the decision.⁶ They cannot be personally charged with costs;⁷ but they are liable in damages for a false return made by them.⁸ The liability of the appellants is joint, not several.⁹

§ 4. Reference of Controversy by Trustees of Insolvent Debtor.—A controversy between the trustees of an insolvent debtor and any other person in the settlement of any demands against such debtor, or of debts due his estate, may be referred to one or more indifferent persons, who may be agreed upon by the trustees and the party with whom such controversy shall exist, by a writing to that effect signed by them.¹⁰ This provision applies only to debts arising on contract, express or implied; it has no reference to a claim of title to stock in a corporation;¹¹ if the parties do not agree on such referees, either party may give ten days' notice of motion before the officer appointing such trustees, or to any judge of the supreme court, at chambers, for such

¹ 1875, *People v. Burton*, 65 N. Y. 452.

² 1 R. S. P. 519, § 89; 1875, *People v. Burton*, 65 N. Y. 452.

³ Sup'm. Ct. 1878, *People v. Sherman*, 15 Hun, 575; 1874, *People v. Betts*, 55 N. Y. 600.

⁴ L. 1847, Ch. 455, § 9; Sup'm. Ct. 1880, *People v. Supervisors*, 20 Hun, 196.

⁵ Ct. App. 1859, *Disosway v. Winant*, 33 How. 460.

⁶ Ct. App. 1859, *Disosway v. Winant*, 33 How. 460.

⁷ Sup'm. Ct. 1878, *People v. Sherman*, 15 Hun, 575.

⁸ 1879, *Rector v. Clark*, 78 N. Y. 21.

⁹ Ct. App. 1859, *Disosway v. Winant*, 33 How. 460.

¹⁰ 2 R. S. p. 45 § 19.

¹¹ Sup'm. Ct. 1842, *Matter of Deny*, 2 Hill, 220.

appointment.¹ On the day so specified, on due proof of notice, the officer shall select one or more referees, in accordance with the rules and practice of the supreme court.² If any of the witnesses reside outside the county of residence of the trustees when appointed, the referee has the same power to issue a commission to take testimony as is possessed by a justice of the peace, and the testimony may be read in the like manner.³ The officer so selecting shall certify thereto in writing, such certificate or agreement shall be filed by the trustees in the office of a clerk of the supreme court, or in the office of a clerk of the common pleas in the county where the trustees were appointed, whereupon the clerk shall enter an order appointing the persons selected to determine the controversy;⁴ such referees have the same powers and are subject to the like duties and obligations as referees appointed by the supreme court in personal actions;⁵ their report shall be filed in the office in which they were appointed, and is conclusive unless set aside by the court.⁶ Since they have the same powers and are subject to the same obligations as referees in actions, the report must contain findings of fact and conclusions of law separately stated.⁷ Judgment may be entered on the report,⁸ unless such report is set aside on motion.⁹ The statute fails to direct how judgment shall be entered, whether by the clerk on filing the report, or only by direction of the court. The old practice was to file the report and to enter a common rule for confirmation and judgment which expired after four days in term. Within that time, if at all, a motion was to be made to set aside the report; if not so made, the report was confirmed and judgment entered,¹⁰ a practice still preserved in references other than of issues.¹¹ This mode of entering judg-

¹ 2 R. S. p. 45, § 20.

² 2 R. S. p. 45, § 21.

³ 2 R. S. p. 45, § 22.

⁴ 2 R. S. p. 45, § 23.

⁵ 2 R. S. p. 45, § 24; *ante*, p. 35.

⁶ 2 R. S. p. 45 § 25.

⁷ Code Civ. Proc. § 1022; *ante*, p.

⁸ 1870, *Austin v. Rawdon*, 42 N.

Y. 155; 1880, *Crosby v. Day*, 81 N.

Y. 242.

⁹ 1870, *Austin v. Rawdon*, 42 N.

Y. 155.

¹⁰ 1879, *Austin v. Rawdon*, 42 N.

Y. 155.

ment on the report of the referee for the trial of issues has been changed by subsequent enactments except in certain specified causes;¹ but the right to move to set aside the report, before judgment, it would seem, still remains.² The question is not free from doubt, and the safe course would seem to be to file the report and proceed under rule 30.

§ 5. **Reference on Application for Voluntary Dissolution of a Corporation.**—A reference may be ordered in proceedings for the voluntary dissolution of a corporation.³ The referee may be appointed in the order to show cause why the corporation should not be dissolved, or appointed when or after the order is returnable.⁴ The general powers and duties of the referee are the same and the proceedings are conducted in the same manner as on other special proceedings.⁵ The hearings must be had in the place where the principal business office of the corporation is located.⁶ The proceedings are statutory, and the provisions of the code must be strictly followed; otherwise the court gets no jurisdiction.⁷ The original petition and the schedules must, upon the written order of the judge or referee, be transmitted to him to be used on the hearing.⁸ The form of the report is the same as on other special proceedings.⁹ It must contain a statement of the effects, credits and other property, and of the debts and other engagements of the corporation, and all other matters pertaining to its affairs;¹⁰ a statement to the effect that the schedules annexed to the petition are correct, is insufficient.¹¹ The motion for final dissolution on the report must be made to the court, upon notice to each person who has made himself a party to the proceedings, by filing with the clerk, before the close of the hearing, a notice of his appearance in person or by at-

¹ Code Civ. Proc. § 1229.

² 2 R. S. 45, § 25.

³ Code Civ. Proc. § 2423.

⁴ Code Civ. Proc. § 2426.

⁵ *Ante* P. 110.

⁶ Sup'm. Ct. Sp. T. 1857, *Matter of Westchester Iron Co.*, 15 How. 7.

⁷ Sup'm. Ct. 1883, *Matter of Pyrolusite Co.*, 29 Hun, 429.

⁸ Code Civ. Proc. § 2427.

⁹ *Ante*, P. 112.

¹⁰ Code Civ. Proc. § 2426; Sup'm. Ct. 1883, *Matter of Pyrolusite Co.*, 29 Hun, 429.

¹¹ Sup'm. Ct. 1883, *Matter of Pyrolusite Co.*, 29 Hun, 429.

torney, specifying a post office within the state where such notice may be served.¹

§ 6. **Reference of Controversy by Receivers of Corporations.**—Receivers of corporations have the same power to settle any controversy that shall arise between them and any debtors or creditors of such corporation by reference as is given by law to trustees of insolvent debtors.² The manner of appointment, the powers and duties of such referees and the proceedings before them are the same and the report has the same effect as that of referees appointed by trustees in the case of insolvent debtors.³ As to such appointment, powers and duties, see p. 145, *ante*. The statute is constitutional.⁴ Before a compulsory reference can be ordered it must be made to appear that an offer had been made to agree upon a referee.⁵ The controversy may be referred, though an action has been begun, and fraud is set up in the answer.⁶ Where there is a dispute between the receivers of two savings banks, the court may compel them to make an agreement to refer.⁷ The reference is a special proceeding.⁸ The form of the report is nowhere prescribed, but since the proceedings are to be conducted in the same manner as in references in actions in the supreme court, it would seem that the form of the report should be the same. The provisions of Section 1019 of the code as to the time when the report must be filed have no reference to special proceedings.⁹ The report may be reviewed by motion to set aside or to confirm at special term.¹⁰ The court has authority to order judgment on the report.¹¹ The manner

¹ Code Civ. Proc. § 2428.

² 2 R. S. p. 469, § 73; 1880, *Matter of Crosby v. Day*, 81 N. Y. 242.

³ 2 R. S. p. 469, § 73.

⁴ 1880, *Matter of Crosby v. Day*, 81 N. Y. 242; 1863, *Sands v. Kimbark*, 27 N. Y. 147.

⁵ Sup'm. Ct. 1878, *Wickham v. Frazee*, 13 Hun, 431.

⁶ 1880, *Matter of Crosby v. Day*, 81 N. Y. 242.

⁷ Sup'm. Ct. 1873. *Guardian Sav.*

Bank v. Bowling Green Sav. Bank, 65 Barb. 275.

⁸ Sup'm. Ct. 1865, *Matter of Austin*, 44 Barb. 434.

⁹ Sup'm. Ct. Sp. T. 1864, *Godding v. Porter*, 17 Abb. 374.

¹⁰ 1870, *Austin v. Rawdon*, 42 N. Y. 155; below *Matter of Austin*, 44 Barb. 434; 2 R. S. p. 469, § 73.

¹¹ 1870, *Austin v. Rawdon*, 42 N. Y. 155; reversing *Matter of Austin*, 44 Barb. 434.

of entry is the same as in other references under Rule 30.¹

§ 7, **Reference of Controversy by Receiver of Insolvent Insurance Company.**—Any controversy or disagreement between the receiver of a mutual insurance company and any member or stockholder thereof may be referred by written agreement between the parties, or may be compulsorily referred by any justice of the supreme court in the district where the receiver keeps his office, on ten days' notice of motion.² Said court may refer any action to which the receiver was a party, pending when the act was passed, without prejudice to proceedings already had;³ but this section has no application to actions begun after the act was passed.⁴ Proceedings before such referee are brought to a hearing in the same manner as in actions in the supreme court.⁵ The referee may proceed in a summary manner to hear proofs and allegations upon written or oral pleadings, and has the same powers, duties and obligations, and may receive the same compensation as a referee appointed by the supreme court, and on his report judgment may be entered in like manner.⁶ The report must contain findings of fact and conclusions of law, separately stated.⁷ The report may be set aside on appeal from the judgment to the general term; but such appeal shall not delay execution unless there is filed with the notice of appeal a certificate of a justice that there is probable cause therefor; nor unless security be given for the payment of the judgment and costs of appeal.⁸ The referee, at any time after his appointment, and before issue joined, has the same power and authority to issue a commission to take testimony that a justice of the peace now has.⁹ The act is not in conflict with the constitution.¹⁰ Where the proceedings are begun for the

¹ 1870, *Austin v. Rawdon*, 42 N. Y. 155.

² L. 1862, P. 743, Ch. 412, § 1.

³ L. 1862, Ch. 412, § 5.

⁴ Sup'm. Ct. 1865, *Sands v. Bride*, 29 How. 305.

⁵ L. 1862, Ch. 412, § 3; *Ante*, P. 34.

⁶ L. 1862, Ch. 412, § 2.

⁷ *Matter of Harmony Co.*, 14 Abb. N. S. 292, n.

⁸ L. 1862, Ch. 412, § 2.

⁹ L. 1862, Ch. 412, § 4.

¹⁰ 1863, *Sands v. Kimbark*, 27 N. Y. 147; Sup'm. Ct. 1863, *Sands v. Tillnghast*, 24 How. 435.

collection of assessments, evidence of losses making the assessment necessary must be produced ; an *ex parte* affidavit of the receiver is insufficient.¹

§ 8. **Reference under N. Y. Banking Act.**—A justice of the supreme court may appoint a referee to apportion the debts and liabilities of an insolvent bank among the stockholders ;² but such appointment can be made only after the receiver has reported to the court a list and statement of the persons who are stockholders, the nominal amount of stock held by each, and the residence of the stockholders, so far as the same can be ascertained.³ No appeal can be taken from the order of reference.⁴ The referee must give to each stockholder ten days' notice of his appointment, and of the time and place of hearing, by service personally on the stockholders residing in the county where the principal office or place for conducting business was situated, or by leaving a copy thereof at the residence of such stockholder with some person of suitable age ; and upon all other stockholders by publishing the same in one advertisement, containing the names of all such stockholders, for three weeks, in such newspapers as any justice of the supreme court may direct ; one of said newspapers to be the one designated by law for the publication of legal notices, and one, if such there be, printed in the county where the chief office for conducting the business of such corporation or association is located.⁵ The referee, on the hearing, must hear the allegations and proofs of all parties and persons interested, and must ascertain the persons who are chargeable, as stockholders, for the debts and liabilities, and the amount chargeable to each under the rules and principles of the N. Y. banking act ; the referee's statement is not conclusive.⁶ He must make a report to the justice holding the first special term of that or an adjoining county after six weeks from the date of his appointment, showing in detail the apportionment

¹ 1863, *Sands v. Kimbark*, 27 N. Y. 147.

² L. 1882, Ch. 409, § 140.

³ Id. §§ 139, 140.

⁴ Id. § 151.

⁵ Id. § 141.

⁶ Id. § 142.

made by him of the debts and liabilities among the stockholders, with the proofs taken by him on such hearing. The justice may, if in his opinion it is necessary, to enable the referee to complete such apportionment, grant such further time, not exceeding ninety days, as may be necessary.¹ On the final completion of such apportionment the report must be made to such special term of the supreme court, and the justice must examine the same and hear the allegations of the parties and persons interested, and may confirm, modify or amend the same, or send it back to the same or another referee, for further proof or examination.² When finally confirmed, such report, and the order confirming the same, must be filed in the office of the clerk of such county, as shall be directed by the justice. When so filed it is final and conclusive as a judgment against each stockholder for the amount found chargeable against him unless an appeal therefrom is duly entered and allowed.³ The expenses of the reference must be fixed by the justice confirming the report, and paid out of the funds in the hands of the receiver before making a dividend.⁴ An appeal from the order of confirmation and the judgment entered therein is taken in the same manner and with like security as from judgment at special term in an action; but when the receiver appeals he shall not be required to file security for costs.⁵ Upon the application of creditors or shareholders of any banking association whose debts or shares amount to one thousand dollars, and stating facts verified by affidavit, the supreme court may order a strict examination of all the affairs of such association, to be made by a referee to ascertain the safety of its investment and the prudence of its management.⁶ The powers and duties of such referee depend largely upon the terms of the order appointing him. He has the general powers and duties of a referee in special proceedings, and his report is in the same general form.

¹ Id. § 142.

² Id. § 143; 1858, U. S. Trust Co. v. Empire City Bank, 18 N. Y. 199.

³ Id. § 144; 1870, Austin v. Rawdon, 42 N. Y. 155.

⁴ Id. § 146; 1883, Atty.-General

v. Continental L. I. Co. 93 N. Y. 45.

⁵ Id. § 152.

⁶ L. 1882, Ch. 409, § 19.

PART IV.

References in Particular Actions.

CHAPTER I.

REFERENCES IN ACTIONS FOR FORECLOSURE.

- SECTION 1.—Reference of issues or part of issues.
SECTION 2.—Reference to compute amount due.
SECTION 3.—Report on reference to compute amount due.
SECTION 4.—Referee to sell, general powers and duties.
SECTION 5.—Notice of sale.
SECTION 6.—Re-sale.
SECTION 7.—Deed of referee.
SECTION 8.—Report of referee to sell.
SECTION 9.—Fees of referee to sell.
SECTION 10.—Reference as to surplus moneys.
SECTION 11.—Report of referee as to surplus moneys.

§ 1. **Reference of Issues or Part of Issues.**—All the issues in an action for foreclosure of a mortgage upon real property may be referred by consent, except when a defendant who will be affected by the result of the trial is an infant.¹ A compulsory reference may be ordered in such action where a long account is involved, and the trial will not require the decision of difficult questions of law ;² the proceedings to obtain a reference, the form of the order, the qualifications of the referee, the proceedings on the trial, the rights and duties of the referee, and the report are the same as in the reference of an action at law.³ Any one of the issues in such action may be referred by a compulsory order, or the referee may be ordered to report findings on any spe-

¹ Code Civ. Proc. §§ 1011, 1012.

² Code Civ. Proc. § 1013; *ante*, P. 12, *et seq.* ³ *Ante*, P. 28, *et seq.*

cific questions of fact,¹ but a compulsory reference of part of the issues can be ordered only in actions involving a long account triable by the court without a jury.² If part only of the issues are referred the order should determine whether they shall be tried before, or after the trial of the action;³ if the referee is directed to report findings upon any specific questions of fact, judgment must be rendered on the whole issues on application to the court.⁴ When the issue last tried is tried before a referee he must award the proper judgment on the whole issue, unless otherwise directed in the order of reference.⁵ To enable him to award the proposed judgment in such case the referee may make a computation, or assessment, or take an account, or proof of a fact, and may ascertain and fix the damages as a jury may do, upon the execution of a writ of inquiry.⁶ On a reference to compute after decree, evidence of fraud in obtaining the mortgage is admissible.⁷ Where the mortgage is given for goods sold the referee of the issue should ascertain the state of the accounts, and judgment should be given only for the amount due not exceeding the sum named in the mortgage.⁸ The referee of the issues has jurisdiction over costs.⁹ His error in reference thereto can be corrected only by appeal from the judgment.¹⁰ The qualifications of the referee and his powers and duties on the trial of the issues are the same as on the trial of issues in other actions.¹¹

§ 2. **Reference to compute Amount due.**—Where the defendant fails to answer within the time allowed, or the right of plaintiff as stated in the complaint is admitted by the an-

¹ Code Civ. Proc. § 1013.

⁶ Code Civ. Proc. § 1223.

² Code Civ. Proc. § 1013; Sup'm. Ct. 1878, *Barnes v. West*, 16 Hun, 68; Sup'm. Ct. 1880, *Dane v. Liverpool &c. Co.* 21 Hun, 259.

⁷ 1853, *McCracken v. Valentine*, 9 N. Y. 42.

⁸ Sup'm. Ct. 1882, *Irwin v. O'Connor*, 15 Week. Dig. 124.

³ Code Civ. Proc. § 1014.

⁹ Sup'm. Ct. 1870, *Stevens v. Varlane*, 2 Lans. 90.

⁴ Code Civ. Proc. §§ 1221, 1226; see interlocutory references, *ante*, P. 92, *et seq.*

¹⁰ Sup'm. Ct. 1878, *Losee v. Ellis*, 13 Hun, 655.

⁵ Code Civ. Proc. § 1221; see *ante*, P. 92, *et seq.*

¹¹ *ante*, PP. 6, 35; Code Civ. Proc. § 1018.

swer, a reference may be ordered to compute the amount due to plaintiff, and to such of defendants as are prior encumbrancers, and to examine and report whether the premises can be sold in parcels, if the whole amount secured by the mortgage has not become due.¹ If defendant is an infant, and has put in a general answer by his guardian, or if any of defendants are absentees, the order shall also direct the referee to take proof of the facts and circumstances stated in the complaint, to examine the plaintiff on oath as to any payments made, and to compute the amount due on the mortgage preparatory to the application for judgment.² The moving papers must show whether all the moneys secured by the mortgage have become due and payable, and whether any of the defendants are absentees or infants, and that a notice of pendency of action was properly filed.³ The reference to compute cannot be ordered where a defendant who failed to appear on the trial has put in an answer raising a material issue,⁴ nor where any defendant against whom a judgment for deficiency is asked has not been served, or has been served only with notice of no personal claim;⁵ nor can a reference to compute as to a defendant who has not answered be combined with one for the trial of the issues as to those who have.⁶ The referee must be selected by the court, and cannot be nominated by either party.⁷ Under a similar rule (73 of 1871) it was held that the appointment of a person nominated by one party and approved by the other was no irregularity.⁸ Where some of the defendants are absentees the order should be to take proof of the facts and circumstances set forth in the complaint, and to report the proofs and examinations had before him.⁹ The reference is inter-

¹ Rule 60; 1867, *Chamberlain v. Dempsey*, 36 N. Y. 144.

² Rule 60; Sup'm. Ct. Sp. T. 1847, *Walcott v. Weaver*, 3 How. 159.

³ Sup'm. Ct. Sp. T. 1847, *Anonymous*, 3 How. 158; Rule 60.

⁴ Sup'm. Ct. Sp. T. 1878, *Exchange Co. v. Early*, 4 Abb. N. C. 78.

⁵ N. Y. Super. 1866, *Goodyear v. Brooks*, 27 Super. 682.

⁶ Sup'm. Ct. 1857, *Cram v. Bradford*, 4 Abb. 193.

⁷ Rule 61.

⁸ Sup'm. Ct. 1874, *White v. Coulter*, 3 T. & C. 608.

⁹ Sup'm. Ct. Sp. T. 1847, *Walcott v. Weaver*, 3 How. 159.

locutory, and the hearing is brought on in the same manner as other interlocutory references.¹ The reference may be had to the clerk, although he is not in the county where the action is triable, may proceed at once, and judgment may be entered on the same day.² On a reference merely to compute on default, the referee need not be sworn;³ but where an answer has been interposed the referee must take the oath, although the defendant so answering did not appear on the trial.⁴ The referee acts as an examiner, and plaintiff must prove by legal evidence every material fact set forth in the complaint.⁵ An affidavit verified before a notary or commissioner of deeds is insufficient.⁶ The recital of the bond in the mortgage is sufficient proof of its execution.⁷ Plaintiff does not, by putting in evidence and allowing defendant to do so, lose the benefit of admissions by failure to deny allegations of the complaint.⁸ That the trustee for bondholders states the amount of bonds secured less than it really is does not prevent the referee from reporting the true amount;⁹ in such case the referee may take evidence as to, and report upon the validity of the bonds secured.¹⁰ Taxes are a legal charge upon the estate, and may be included in the amount due; otherwise of insurance.¹¹ The referee to compute the amount due to the mortgagee and to prior encumbrancers cannot determine the question of priority.¹² Strict proof is necessary where infants and absentees are concerned.¹³ Where the debt secured was for coal supplied and to be supplied, the referee must state the

¹ *Ante*, P. 84.

² Sup'm. Ct. Sp. T. 1857, *Kelly v. Searing*, 4 Abb. 354.

³ N. Y. Super. Sp. T. 1878, *McGowan v. Newman*, 4 Abb. N. C. 80; 54 How. 458; compare Ex. F. I. Co. v. Early, 54 How. 279.

⁴ Com. Pl. Sp. T. 1878, *Exchange Co. v. Early*, 4 Abb. N. C. 78; 54 How. 279.

⁵ Sup'm. Ct. Sp. T. 1847, *Wolcott v. Weaver*, 3 How. 159.

⁶ Sup'm. Ct. Chamb. 1863, *Security Co. v. Martin*, 15 Abb. 479.

⁷ Sup'm. Ct. 1863, *Cooper v. Newland*, 17 Abb. 342.

⁸ 1874, *Darling v. Rogers*, 55 N. Y. 667.

⁹ 1881, *Peck v. N. Y. Co.* 85 N. Y. 246.

¹⁰ Sup'm. Ct. 1880, *Bockes v. Hathorne*, 20 Hun. 503.

¹¹ Chancery, 1821, *Faure v. Winans*, Hopk. Ch. 283.

¹² Chancery, 1849, *Harris v. Fly*, 7 Paige, 421.

¹³ Sup'm. Ct. Sp. T. 1847, *Wolcott v. Weaver*, 3 How. 159.

account and ascertain the amount due;¹ on such reference the testimony need not be signed by the witnesses.²

§ 3. **Report of Referee on Reference to Compute.**—The report must be made within sixty days;³ the form is the same as in other interlocutory references.⁴ The referee must state the facts upon which his conclusions are based,⁵ and attach thereto an abstract of the documentary evidence,⁶ but is not obliged to set forth the items that make up the gross sum.⁷ He must state whether the mortgaged premises are so situated that they can be sold in parcels;⁸ if he finds the property can be sold in parcels he should state their relative situation and value, and which should be first sold, and such other facts as may be necessary to inform the conscience of the court.⁹ Where priority is claimed for a mortgage set up in the answer, he can only compute the amount due thereon; he has no authority to decide the question of priority;¹⁰ when the mortgagee has been compelled to pay rents to preserve his security, the amount so paid may be included in the amount found due if the action is against the mortgagor or his grantee with notice,¹¹ but not where it is against grantee without notice.¹² The amount paid for taxes may also be included,¹³ but not insurance, except by express agreement of the parties.¹⁴ The computation is not conclusive on the court, and may

¹ Sup'm. Ct. 1882, *Irwin v. O'Connor*, 15 Week. Dig. 124.

² Rule 30.

³ Code Civ. Proc. § 1019.

⁴ *Ante*, P. 88.

⁵ Sup'm. Ct. Sp. T. 1847, *Wolcott v. Weaver*, 3 How. 159.

⁶ Sup'm. Ct. Chamb. 1863, *Security Co. v. Martin*, 15 Abb. 479.

⁷ 1882, *Sidenberg v. Ely*, 90 N. Y. 257.

⁸ Sup'm. Ct. Sp. T. 1858, *Gregory v. Campbell*, 16 How. 417; *Selkirk v. Ascough*, 16 Alb. L. J. 151; *Chancery*, 1830, *Ontario Bank v. Strong*, 2 Paige, 301.

⁹ Sup'm. Ct. Sp. T. 1858, *Gregory v. Campbell*, 16 How. 417; *Selkirk v. Ascough*, 16 Alb. L. J. 151; *Chancery*, 1830, *Ontario Bank v. Strong*, 2 Paige, 301.

¹⁰ *Chancery*, 1839, *Harris v. Fly*, 7 Paige, 421.

¹¹ 1874, *Catlin v. Grissler*, 57 N. Y. 363; 1862, *Robinson v. Ryan*, 25 N. Y. 320.

¹² 1862, *Robinson v. Ryan*, 25 N. Y. 320.

¹³ *Chancery*, 1824, *Faure v. Wilians*, *Hopk.* 283.

¹⁴ *Chancery*, 1824, *Faure v. Wilians*, *Hopk.* 283.

be sent back for further findings.¹ The motion to confirm and for judgment must be made at special term, not at chambers.² When confirmed, the report becomes the act of the court.³ It is not necessary that the report of the referee appointed in the decree to compute should be confirmed and final judgment ordered by the judge who tried the cause.⁴

§ 4. **Referee to Sell, General Powers and Duties.**—The referee to sell in foreclosure may be appointed in the judgment, or by motion at special term.⁵ He must be selected by the court; one nominated by either party cannot be appointed,⁶ but the appointment of a person named by one and approved by the other party has been held to be no irregularity;⁷ the notary before whom the affidavit to move for the reference was verified cannot be selected.⁸ The duties of such referee are ministerial. If he disregards, or varies from the terms of the judgment, he does so at his peril, and is liable for losses caused thereby, including costs of proceedings against him for disobedience;⁹ in making the sale he acts as an officer of the court, not as the mere agent of the plaintiff, and the court will relieve against an improper exercise of his discretion.¹⁰ When the mortgage covers several lots, one of the defendants may have a reference, even after decree, to ascertain the equities of different defendants, and report upon the order in which the premises should be sold;¹¹ the sale must be in parcels where the mortgage covers several separate lots;¹² a re-sale will be ordered where a request to sell in parcels was improperly

¹ 1874, *Austin v. Ahearne*, 61 N. Y. 6.

² Sup'm. Ct. 1876, *Empire Ass'n. v. Stevens*, 8 Hun, 515; 1850, *Swarthout v. Curtis*, 4 N. Y. 415.

³ N. Y. Super. Sp. T. 1878, *McGowan v. Newman*, 4 Abb. N. C. 80.

⁴ 1867, *Chamberlain v. Dempsey*, 36 N. Y. 144.

⁵ Rule 61; Sup'm. Ct. 1874, *Mundorf v. Mundorf*, 1 Hun, 41.

⁶ Rule 61.

⁷ Sup'm. Ct. 1874, *White v. Coulter*, 1 Hun, 357; 59 N. Y. 629.

⁸ Sup'm. Ct. Sp. T. 1880, *Steward v. Bogart*, 2 Law Bul. 94.

⁹ 1873, *People v. Bergen*, 53 N. Y. 404.

¹⁰ Sup'm. Ct. Sp. T. 1855, *Breese v. Busby*, 13 How. 485.

¹¹ Sup'm. Ct. Sp. T. 1847, *Bard v. Steele*, 3 How. 110.

¹² Code Civ. Proc. §§ 1437, 1678;

refused,¹ but a sale in parcels is not a matter of absolute right if, when the mortgage was made, the property consisted of a single tract which has been subsequently divided into lots.² If a grantee of part of the premises is entitled to a right of way, or other easement in part of the premises, such portion must be sold subject to such easement.³ The statute as to sale in parcels is directory; a violation thereof does not make the sale void, but voidable.⁴ A sale will not be set aside for failure to sell in parcels if no request therefor was made, and the referee was satisfied the property would sell better in bulk.⁵ Since the amendment of 1881 to section 1678 of the code of civil procedure, the court may in any case direct a sale in parcels of distinct buildings and lots,⁶ and when the property has been conveyed in different parcels the court may direct the order of sale;⁷ unless so directed the order of sale is in the discretion of the referee where the premises adjoin, and are owned by one person.⁸ When the premises are sold after the giving of the mortgage to different purchasers, the parcels should be sold in the inverse order of their alienation, according to the equitable rights of the different purchasers as between themselves.⁹ The decree or order should direct the referee to sell in the inverse order of

Sup'm. Ct. Sp. T. 1862, *Wolcott v. Schenck*, 23 How. 385; N. Y. Super. 1862, *Griffiths v. Hadley*, 23 Super. 588; Chancery, 1841, *Am. Ins. Co. v. Oakley*, 9 Paige, 259.

¹ Sup'm. Ct. Sp. T. 1862, *Wolcott v. Schenck*, 23 How. 385; Sup'm. Ct. 1875, *Vandercook v. Cohoes Co.* 5 Hun, 641.

² Sup'm Ct. 1877, *Ellsworth v. Lockwood*, 9 Hun, 548; Sup'm. Ct. 1877, *Lane v. Conger*, 10 Hun, 1; 1885, *Bernhardt v. Lymburner*, 85 N. Y. 172. See Code Civ. Proc. § 1437.

³ Chancery, 1846, N. Y. L. & T. Co. v. Milner, 1 Barb. Ch. 353.

⁴ 1858, *Cunningham v. Cassidy*, 17 N. Y. 276; Com. Pl. Sp. T. 1881, *Wallace v. Feely*, 61 How. 225.

⁵ Com. Pl. 1880, *McLaughlin v. Teasdale*, 9 Daly, 23.

⁶ Sup'm. Ct. Sp. T. 1883, *Reynolds v. Telfair*, 5 Law Bul. 21.

⁷ 1872, *Hart v. Wandle*, 50 N. Y. 381; 1872, *Erie Co. Bank v. Roof*, 48 N. Y. 292; Sup'm. Ct. Sp. T. 1873, *State Bank v. Hibbard*, 45 How. 280; Sup'm. Ct. 1882, *Van Slyck v. Van Loan*, 26 Hun, 344.

⁸ Sup'm. Ct. 1862, *Whitbeck v. Rowe*, 25 How. 403.

⁹ 1849, *Crafts v. Aspinwall*, 2 N. Y. 289; Chancery, 1847, *Stuyvesant v. Hall*, 2 Barb. Ch. 151; 1881, *Bernhardt v. Lymburner*, 85 N. Y. 172; Chancery, 1846, N. Y. L. & T. Co. v. Milnor, 1 Barb. Ch. 353,

alienation, according to equity as between the several defendants, leaving the referee to settle the order of sale upon the principles of equity.¹ Where three mortgages on the same property, made and recorded at the same time, are foreclosed, and judgments directing sale are entered at the same time, the referee has no power to create a preference of one judgment over the other.² If he makes a sale not authorized by the decree, the remedy is by application to the court for a re-sale.³ The terms of sale cannot vary the judgment, or relieve the referee from the performance of his duties.⁴ The referee has no power, unless expressly given in the judgment, to allow to a purchaser the amount of a prior mortgage, and receive from him only the balance of the purchase money; ⁵ but if, at the request of the purchaser, and for his benefit he varies the order of payment prescribed in the judgment, such purchaser cannot be heard to complain.⁶ If the purchaser fail to produce proof of liens the referee should apply to the court for instructions.⁷ A request that the sale should not be had on Election Day should be granted.⁸ It is the duty of the referee at the time and place of sale, 1st, to announce the terms of sale if they are not contained in the notice thereof; 2d, to offer the premises to the highest bidder, and receive bids so long as they are offered, waiting a reasonable time after a bid is made for another, and if no other is made to strike off the premises to the highest bidder; 3d, after marking down the premises to the highest bidder to require him to sign a memorandum of sale and an agreement to complete the same. If at the time appointed for the sale there are no bidders, or if from the numbers in attendance, or other sufficient causes the officer is satisfied that a fair price can-

¹ Chancery, 1841, *Rathbone v. Clark*, 9 Paige, 648. See *Bernhardt v. Lymburner*, 85 N. Y. 172.

² Sup'm. Ct. 1878, *Eleventh Ward Bank v. Hay*, 55 How. 444.

³ Ct. App. 1868, *Hotchkiss v. Clifton Co.*, 4 Keyes, 170.

⁴ 1873, *People v. Bergen*, 53 N. Y. 404.

⁵ N. Y. Super. 1876, *Bache v. Doscher*, 61 Super. 150; 67 N. Y. 429.

⁶ 1878, *Easton v. Pickersgill*, 75 N. Y. 599.

⁷ 1878, *Easton v. Pickersgill*, 75 N. Y. 599.

⁸ 1867, *King v. Platt*, 37 N. Y. 155.

not be obtained, he should postpone the sale.¹ It is an unreasonable exercise of discretion to refuse to adjourn the sale for twenty minutes to allow an order staying proceedings to arrive.² The purchaser is bound by the terms of sale.³ It is not essential to the validity of the contract that the purchaser should sign the memorandum of sale; the signature of the officer making it is sufficient.⁴ The referee must demand money for property sold, and if not paid must then and there avoid the sale and re-sell the property or postpone the sale, giving notice, and make a new sale at a subsequent time. If he gives credit, or takes anything but money, he is liable therefor.⁵ He may be compelled to give security for the proper application of the moneys arising from the sale.⁶ Except when otherwise expressly prescribed by law the sale must take place in the county where the property is situated.⁷ Unless otherwise expressly directed in the decree the referee must, out of the proceeds, pay all taxes, assessments, and water rates, and redeem the property from sales for unpaid taxes, assessments, or water rates, which have not apparently become absolute, and the sums so paid are to be deemed expenses of the sale.⁸ The referee to sell, or the guardian for an infant party, cannot, nor can any person for his or their benefit, directly or indirectly, purchase, or be interested in the purchase of, any of the property, except that the guardian may, when he is authorized so to do, purchase for the benefit, or on behalf of his ward. The violation of this section is a misdemeanor, and a purchase made contrary to this section is void.⁹

§ 5. **Notice of Sale.**—Where the property is not situated wholly or partly in a city in which a daily paper is pub-

¹ Sup'm. Ct. Sp. T. 1862, *Bicknell v. Byrnes*, 23 How. 486.

² Sup'm. Ct. Sp. T. 1855, *Breese v. Busby*, 13 How. 485.

³ 1872, *Hart v. Wandle*, 50 N. Y. 381.

⁴ Sup'm. Ct. Sp. T. 1862, *Bicknell v. Byrnes*, 23 Hun, 486; *Chancery*, 1820, *McComb v. Wright*, 4 J.

Ch. 659; *Chancery*, 1847, *Nat. Ins. Co. v. Loomis*, 11 Paige, 431.

⁵ 1882, *Robinson v. Brennan*, 90 N. Y., 208.

⁶ Code Civ. Proc. § 1243.

⁷ Code Civ. Proc. § 1242.

⁸ Code Civ. Proc. § 1676.

⁹ Code Civ. Proc. § 1679.

lished, a written or printed notice must be conspicuously posted at least forty-two days before the sale, in the town or city where the sale is to take place, and also in the public places where the property is situated if the sale is to take place in another town or city, and a copy of the notice must be published once in each of the six weeks immediately preceding the sale, in a newspaper published in the county if there is one; if none, in a paper designated by the court ordering the sale;¹ and if the property is situated wholly, or partly in a city in which a daily newspaper is published, the notice may be given by publishing the same twice a week for the three successive weeks immediately preceding the sale in one, or in the cities of New York or Brooklyn in two such papers.² The property must be described with common certainty, by setting forth the name of the township or tract, and the number of the lot, if any, or by some other appropriate description;³ should contain the description and particular boundaries so far as the same can be ascertained from the mortgage.⁴ The title of the cause is not essential, but the better practice is to insert it;⁵ nor need a sale in parcels be announced in the notice, although the judgment directs that the sale be so made.⁶ In the cities of New York and Brooklyn the sale must be between the hours of twelve and three o'clock, unless otherwise specially directed in the decree, must be at public auction, notice whereof must be given in accordance with the code, and in the city of New York must be at the exchange salesroom, subject to the regulation of the supreme court, the superior court, or the court of common pleas.⁷ A week is a definite time, beginning on Sunday and ending on Saturday.⁸ The publication is sufficient if published once in each week for six successive weeks, although six full weeks have not elapsed between the first and last

¹ Code Civ. Proc. §§ 1434, 1678.

² Code Civ. Proc. § 1678.

³ Code Civ. Proc. § 1435.

⁴ Rule 61.

⁵ Chancery, 1837, *Ray v. Oliver*, 6 Paige, 489.

⁶ Sup'm. Ct. 1880, *Hoffman v. Burke*, 21 Hun, 580; 1860, *Alcott v. Robinson*, 21 N. Y. 150.

⁷ Rule 62.

⁸ Com. Pl. Sp. T. 1872, *Steinle v. Bell*, 12 Abb. N. S. 171.

publications.¹ Publication Dec. 9, 12, 16, 19, 23, and 26 for a sale Dec. 28 is a publication twice in each week for three weeks;² so is publication April 27, 30, May 4, 7, 11, 14, and in one paper May 20, of a sale on May 20.³ It is not necessary that the notice should appear in all the editions of the paper issued on the day of publication.⁴ Personal service of notice on the mortgagor is unnecessary. The sale is valid if made without his knowledge;⁵ nor is the sale vitiated by an amendment of the judgment pending publication.⁶ It may be adjourned in a proper case⁷ as where a stay has been granted.⁸ Failure to advertise the adjournment is not a jurisdictional defect, especially where no one has been misled.⁹ The adjourned day should be named, but if omitted by defendant's fault the sale is not vitiated.¹⁰ Notice of such adjournment must be published.¹¹ If there is a variance between the day announced and that stated in the published notice the sale will be irregular.¹²

§ 6. **Re-Sale.**—When the time for selling pursuant to notice has passed, and no valid sale has been made, or if valid the party elects to disregard it, the referee cannot sell again without the authority of the court unless he again advertise the sale.¹³ If, by the terms of the sale the money is to be paid down, and the purchaser does not on demand, pay the mon-

¹ Com. Pl. Sp. T. 1872, *Steinle v. La Farge v. Van Wagonen*, 14 How. Bell, 12 Abb. N. S. 171; 1871, *Wood* 54; Sup'm. Ct. Sp. T. 1862, *Bicknell v. Byrnes*, 23 How. 486.
v. Morehouse, 45 N. Y. 368; 1860, *Alcott v. Robinson*, 21 N. Y. 150.

² N. Y. Super. Sp. T. 1862, *Chamberlain v. Dempsey*, 13 Abb. 421. ⁸ Sup'm. Ct. 1876, *Ward v. James*, 8 Hun, 526; Sup'm. Ct. Sp. T. 1857, *La Farge v. Van Wagonen*, 14 How. 54.

³ Sup'm. Ct. 1882, *Valentine v. McCue*, 26 Hun, 456. ⁹ Sup'm. Ct. 1887, *Bechstein v. Schultz*, 19 Abb. N. C. 168.

⁴ Sup'm. Ct. 1880, *Everson v. Johnson*, 22 Hun, 115. ¹⁰ Sup'm. Ct. Sp. T. 1857, *La Farge v. Van Wagonen*, 14 How. 54.

⁵ Sup'm. Ct. Sp. T. 1853, *Westgate v. Handlin*, 7 How. 372; Sup'm. Ct. 1881, *Gallup v. Miller*, 25 Hun, 298. ¹¹ Sup'm. Ct. Sp. T. 1857, *La Farge v. Van Wagonen*, 14 How. 54.

⁶ Sup'm. Ct. 1882, *Valentine v. McCue*, 26 Hun, 456. ¹² Sup'm. Ct. 1847, *Miller v. Hull*, 4 Den. 104.

⁷ Sup'm. Ct. 1876, *Ward v. James*, 8 Hun, 526; Sup'm. Ct. Sp. T. 1857, *v. Byrnes*, 23 How. 486. ¹³ Sup'm. Ct. Sp. T. 1862, *Bicknell*

ey, then the referee should at once proceed and offer the premises again for sale.¹ Where the purchaser objects to the title and a re-sale is ordered, it must be upon substantially the same terms as the first sale; if materially different, the first purchaser is released from liability for the deficiency.² If the re-sale is ordered in parcels, it is not necessary that the notice should so state.³ Where the title fails, the full amount of purchase money paid must be returned to the purchaser.⁴ The auctioneer is entitled to no fees for the adjournment of the sale.⁵ A re-sale may be ordered where the price was inadequate, and the terms of sale required payment of twenty-five dollars for auctioneer's fees.⁶

§ 7. **Deed of Referee.**—The deed of the referee must comply strictly with the provisions of Section 1244 of the Code of Civil Procedure;⁷ must contain the names of the parties who executed the mortgage sought to be foreclosed, and must state that the right, title and interest which said mortgagors had at the time of the execution of the mortgage was sold and is conveyed.⁸ Valid and sufficient deed is a deed in form and terms sufficient to give to the purchaser a title as valid as is in the power of the referee to give.⁹

§ 8. **Referee to Sell, Report of Sale.**—The report of sale should be filed immediately after the proceedings are completed, should contain a statement of the proceedings under the order, and must be accompanied with a proper voucher for the surplus moneys, showing that they have been paid over, deposited, or disposed of in pursuance of

¹ Sup'm. Ct. Sp. T. 1862, Bicknell v. Byrnes, 23 How. 486.

² 1878, Riggs v. Pursell, 74 N. Y. 370.

³ Sup'm. Ct. 1880, Hoffman v. Burke, 10 Week. Dig. 347.

⁴ Sup'm. Ct. 1872, Raynor v. Selmes, 7 Lans. 440.

⁵ Sup'm. Ct. 1876, Ward v. James, 8 Hun, 526.

⁶ Sup'm. Ct. 1878, Arnold v. Egbert, 7 Week. Dig. 266.

⁷ Sup'm. Ct. 1877, Randell v. Van Ellert, 54 How. 363; 4 Abb. N. C. 88.

⁸ Code Civ. Proc. § 1244; Sup'm. Ct. 1877, Randell v. Van Ellert, 54 How. 363; 4 Abb. N. C. 88.

⁹ 1873, Easton v. Pickersgill, 55 N. Y. 310.

the judgment.¹ No notice of filing need be given, nor is an order of confirmation necessary.² The sale alone does not divest the title of the mortgagor; the title is not complete until the report of sale is confirmed.³ Exceptions thereto may be filed after the time therefore has expired by defendant who had no notice of such filing, although such defendant did not appear until after judgment.⁴ A referee who in his report admits that he has allowed to a purchaser the amount of a prior mortgage he was not directed by the judgment to pay, may be ordered on motion to pay into court the surplus over the payments ordered in the decree.⁵ Where he has made an error that could have been corrected in the court below, but has made no request therefor, he should be charged with costs of appeal.⁶ If the report is erroneous, the court will, in a proper case, permit the referee to make a new one.⁷ It cannot be sustained by affidavits tending to show the sale was made in terms other than those stated in the report.⁸ One having an interest in the surplus may file exceptions to the report, though not a party to the action.⁹ Where it appears on the face of the report that the alleged deficiency was caused by crediting the purchaser with the amount of a prior mortgage, without express direction therefor in the decree, no judgment for deficiency can be entered.¹⁰ Where the position of the referee as to the moneys is not changed, delay of two years is not such laches as will defeat a motion to compel a referee to satisfy liens.¹¹

§ 9. Fees of Referee to Sell.—The fees of a referee to sell

¹ Rule 61.

² Sup'm. Ct. 1878, *Moore v. Shaw*, 15 Hun, 428; See *Peck v. Knickerbocker Co.* 18 Hun, 183.

³ Sup'm. Ct. 1879, *Peck v. Knickerbocker Co.* 18 Hun, 183.

⁴ 1877, *Martin v. Lowenstein*, 68 N. Y. 456.

⁵ N. Y. Super. 1879, *Koch v. Purcell*, 45 Super. 162.

⁶ N. Y. Super. 1879, *Koch v. Purcell*, 45 Super. 162.

⁷ N. Y. Super. 1879, *Koch v. Purcell*, 45 Super. 162.

⁸ N. Y. Super. 1879, *Koch v. Purcell*, 45 Super. 162.

⁹ N. Y. Super. 1879, *Koch v. Purcell*, 45 Super. 162.

¹⁰ N. Y. Super. 1876, *Bache v. Doscher*, 41 Super. 140.

¹¹ 1881, *Weseman v. Wingrove*, 85 N. Y. 353.

in foreclosure are the same as those allowed to a sheriff, and the disbursements allowed are the same.¹ He cannot make a valid contract for a higher rate.² In no event can he receive more than fifty dollars for his compensation.³ For receiving and entering the decree he is entitled to fifty cents, for advertising the sale two dollars, unless it is stayed or settled before sale, when it shall be one dollar, and commissions on the moneys received and paid out at the rate of ten per centum on two hundred and fifty dollars, two per centum on the residue.⁴ In the counties of New York, Kings and Westchester the poundage is two and one-half per centum on the first one hundred and fifty dollars, and one and one-quarter on the residue.⁵ Poundage can be allowed only on moneys received and paid out, not on moneys deposited with the chamberlain;⁶ nor on a mortgage subject to which the sale is made.⁷ In the city of New York the fees of a referee to sell are governed by L. 1869, ch. 569, as amended by L. 1874, ch. 192.⁸ Under this act the fees in New York are for receiving and posting the notice of sale, ten dollars; for attending the sale, ten dollars; for each deed, five dollars; for each adjournment at the request of plaintiff, not exceeding three dollars; for making report of sale, five dollars; for paying over surplus, three dollars.⁹ He may charge as disbursements printer's fees at the rate allowed by law, fees of officers for taking acknowledgments and administering oaths, auctioneer's fees at the rate of twelve dollars for each parcel, which auctioneer's fees shall be paid by the purchaser.¹⁰ These acts are limited as to the fees of referees by § 3297 of the Code

¹ Code Civ. Proc. §§ 3297, 3307, 3308; Sup'm. Ct. Sp. T. 1881, *Maher v. O'Connor*, 61 How. 103.

² Com. Pl. 1884, *Brady v. Kingsland*, 67 How. 168.

³ Code Civ. Proc. § 3307.

⁴ Code Civ. Proc. § 3307.

⁵ Code Civ. Proc. § 3307.

⁶ Sup'm. Ct. Sp. T. 1881, *Maher v. O'Connor*, 61 How. 103.

⁷ Sup'm. Ct. Sp. T. 1880, *Strauss v. Hellman*, 58 How. 377.

⁸ Common Pleas, 1881, *Lockwood v. Fox*, 61 How. 522; Com. Pl. 1884, *Brady v. Kingsland*, 67 How. 168; N. Y. Super. Sp. T. 1881, *Guivanan v. Carroll*, 4 Law Bul. 6.

⁹ L. 1869, Ch. 569, as amended by L. 1874, Ch. 192.

¹⁰ L. 1869, Ch. 569, as amended by L. 1874, Ch. 192.

of Civ. Proc.¹ Where the case is settled after advertisement and before sale, the referee in New York city is entitled to but two dollars over disbursements.² Where he made three sales, two of which fell through, he was allowed to charge fifty dollars where the sheriff could have charged that sum, besides fifty cents for entering the decree, and two dollars for advertising each sale.³ The referee may appeal from an order in an action whereby his fees are improperly taxed.⁴

§ 10. **Reference as to Surplus Moneys.**—Any one who has a lien on the mortgaged premises at the time of sale may, on filing with the clerk where the report of sale is filed, a notice stating that he is entitled to such surplus or some part thereof, and the nature and extent of his claim, have a reference to ascertain and report the amount due to him, or any other person, which is a lien upon such surplus moneys, and to ascertain the priorities of the several liens thereon.⁵ The application must be founded on an affidavit showing what unsatisfied liens appear by the official searches in the case, whether any and what other unsatisfied liens are known by him to exist, must be on notice to the owner of the equity of redemption, and to any party who has appeared in the cause, or who shall have filed a notice of claim with the clerk.⁶ The order should be to ascertain and report the amount due to the moving party, or any other person, which is a lien upon such surplus moneys, and to ascertain the priorities of the several liens thereon, to the end that upon the coming in and confirmation of the report such further order as to distribution may be made as may be just.⁷ The referee must be selected by the

¹ Sup'm. Ct. Sp. T. 1881, *Maheer v. O'Connor*, 61 How. 103; 1 Civ. Proc. 158.

² Com. Pl. 1881, *Lockwood v. Fox*, 61 How. 522.

³ Sup'm. Ct. 1878, *Wallbridge v. James*, 16 Hun, 8.

⁴ 1881, *Hobart v. Hobart*, 86 N. Y. 636.

⁵ Rule 64.

⁶ Rule 64; Sup'm. Ct. 1886, *Kingsland v. Chetwood*, 39 Hun, 602.

⁷ Any person claiming the surplus moneys arising upon a master's sale of mortgaged premises, or any part of such surplus moneys, may, either in his own name or by his solicitor, give to the master, at

court.¹ Any one having an interest in the land that is cut off by foreclosure should be made a party,² as should a general creditor applying therefor.³ The court may in its discretion, order a reference, or direct a bill to be filed to settle the conflicting claims to the surplus.⁴ The reference is interlocutory, and the general rules for con-

any time before the filing of his report of sale, a written notice of such claim, stating therein the nature and extent of his claim, and the place of residence of himself or of his solicitor. And the master shall annex to and file with his report of the sale all notices so received by him; or a notice of such claim upon the surplus moneys may be filed by the claimant with the register, assistant register or clerk where the report is filed and the surplus moneys are paid by the master. On the coming in and confirmation of the report of the sale, any party to the suit, or any person not a party who had a lien on the mortgaged premises at the time of the master's sale, either by judgment or decree, upon filing with the register, assistant register or clerk where such surplus moneys are deposited, notice stating that he is entitled to such surplus moneys or such part thereof, and the nature and extent of his claim, may have an order of course referring it to a master to ascertain and report the amount due to him or to any other person which is a lien upon such surplus moneys, and to ascertain the the priorities of several liens thereon; to the end that, on the coming in and confirmation of the report of such reference, such farther order or decree may be made for the distribution of such surplus moneys as may be just. Every party who appeared in the cause, and every person who shall have delivered such

written notice of his claim to the master who made the sale, or who shall have filed such notice with the register, assistant register or clerk, where the surplus moneys are deposited, previous to the entry of the order of reference, shall be entitled to service of a summons to attend the master on such reference, and to the usual notice of subsequent proceedings relative to such surplus. But if such claimant has not appeared or made his claim by a solicitor of this court, the summons or notice may be served by putting the same into the post office directed to the claimant, at his place of residence as stated in the notice of his claim. Any person making a claim to such surplus moneys, and who shall fail to establish his claim on the reference before the master, may be charged with such costs as the other parties have been subjected to by reason of such claim; and the parties succeeding on such reference may be allowed such costs as the court may deem reasonable. But no costs unnecessarily incurred on such reference, or previous thereto, by any of the parties, shall be allowed on taxation, or paid out of such surplus. Chancery Rule 136.

¹ Rule 64.

² 1871, *Clarkson v. Skidmore*, 46 N. Y. 297.

³ Sup'm Ct. 1881, *German Sav. Bank v. Sharer*, 25 Hun, 409.

⁴ Chancery, 1837, *Sweet v. Jacobs*, 6 Paige, 335.

ducting interlocutory references apply.¹ The only claims that can be enforced in these proceedings are those that have ripened into liens; mere equitable claims cannot be considered;² but an attorneys lien on a judgment for his fees may be allowed.³ The referee should ascertain by proper certificates, and other evidence, that all claimants and other proper parties have been summoned to attend before him on such reference, and his report should show that such certificate was produced.⁴ Any lien upon the land is transferred to the surplus;⁵ a demand of dower out of the surplus, without specifying the amount, is sufficient;⁶ an encumbrancer, who has omitted to file notice of claim, may verify and file his claim before the referee and be heard thereon upon such terms as the referee may impose.⁷ A claim of the plaintiff under another encumbrance may be enforced,⁸ as may that of the heirs as against the administrator;⁹ all conflicting claims upon the fund may be litigated and disposed of,¹⁰ but in this proceeding the regularity and good faith of proceedings in actions separate and distinct from the one in which the reference is had cannot be questioned.¹¹ Every question tending to show the equities of the claimants may be examined,¹² including the validity of liens and encumbrances;¹³ a junior encumbrancer may attack the claims.¹⁴ Every

¹ *Ante*, P. 110.

² Sup'm. Ct. Sp. T. 1854, *King v. West*, 10 How. 333; Sup'm. Ct. 1857, *Husted v. Dakin*, 17 Abb. 137.

³ Sup'm. Ct. 1874, *Atlantic Bank v. Hiler*, 3 Hun, 209.

⁴ Chancery. 1841, *Hulbert v. McKay*, 8 Paige, 651.

⁵ Ct. App. 1868, *Matthews v. Duryee*, 4 Keyes, 525.

⁶ Ct. App. 1868, *Matthews v. Duryee*, 4 Keyes, 525.

⁷ Chancery, 1841, *Hulbert v. McKay*, 8 Paige, 651.

⁸ Sup'm. Ct. Sp. T. 1853, *Field v. Hawxhurst*, 9 How, 75; Sup'm. Ct.

Chamb. 1877, *Mut. L. I. Co. v. Truchtnicht*, 3 Abb. N. C. 135.

⁹ 1875, *Dunning v. Ocean Nat. Bank*, 61 N. Y. 497.

¹⁰ Sup'm. Ct. 1886, *Kingsland v. Chetwood*, 39 Hun, 602; 1882, *Fliess v. Buckley*, 90 N. Y. 286; 1879, *Bergen v. Cameron*, 79 N. Y. 146.

¹¹ Sup'm. Ct. 1857, *Husted v. Dakin*, 17 Abb. 137.

¹² Sup'm. Ct. 1880, *Tator v. Adams*, 20 Hun, 131.

¹³ Sup'm. Ct. 1866, *Mut. L. I. Co. v. Brown*, 47 Barb. 618; 1879, *Bergen v. Cameron*, 79 N. Y. 146.

¹⁴ Sup'm. Ct. 1881, *Rogers v. Ivers*, 23 Hun, 424; Chancery, 1840, *Miller*

question between the claimants, including fraud, may be settled.¹ The good faith of one purchasing the equity of redemption may be questioned by one claiming title thereto.² A judgment creditor may attack the validity of conveyances.³ *Prima facie* the one alleged in the bill to own the equity is entitled to the surplus.⁴ If the mortgagee is indebted to the mortgagor in a sum exceeding the amount of the mortgage, and there are no contesting creditors, the amount of such debts as are found due by a referee may be ordered paid to the mortgagee.⁵ Where there are several mortgages, the one first recorded is presumed to be the prior lien, but an agreement to the contrary may be shown on the reference as to surplus.⁶ A general lien is preferred to a subsequent specific one where it is shown the holder of the former has no other fund to which he can resort.⁷ The referee may hear and determine any claims, where the facts set up would authorize the filing of a bill in equity to declare such claim to be a lien.⁸

§ 11. **Referee's Report as to Surplus Moneys.**—The general form of the report is the same as in other interlocutory references⁹. It must show that the parties in interest were duly summoned,¹⁰ who appeared on the hearing,¹¹ and must dispose of the whole surplus.¹² *Prima facie* the mortgagor,

v. Case, Clarke Ch. 395; 1874, Halstead *v. Halstead*, 55 N. Y. 442.

¹ Sup'm. Ct. 1880, Tator *v. Adams*, 58 How. 355; 1879, Bergen *v. Cameron*, 79 N. Y. 146; 1859, Livingston *v. Meldrum*, 19 N. Y. 440; Chancery, 1843, Beekman *v. Gibbs*, 8 Paige, 511; 1872, Schafer *v. Reilly*, 50 N. Y. 61; 1874, Halstead *v. Halstead*, 55 N. Y. 442.

² Sup'm. Ct. Sp. T. 1854, King *v. West*, 10 How. 333; Sup'm. Ct. 1852, Mead *v. Gregg*, 12 Barb. 653.

³ Sup'm. Ct. 1881, Rogers *v. Ivers*, 23 Hun, 424.

⁴ Chancery, 1844, Franklin *v. Van Cott*, 11 Paige, 129.

⁵ Sup'm. Ct. Sp. T. 1859, Beek-

man F. I. Co. *v. First M. E. Church*, 29 Barb. 658; 29 How. 431.

⁶ Sup'm. Ct. 1864, Freeman *v. Schweder*, 43 Barb. 618; 29 How. 263.

⁷ Sup'm. Ct. 1847, Mechanics Bank *v. Richards*, 1 Barb. 271 S. C.; 2 Barb. 245.

⁸ N. Y. Super. 1887, Crombie *v. Rosenstock*, 19 Abb. N. C. 312.

⁹ *Ante*, P. 88.

¹⁰ Chancery, 1841, Hulbert *v. McKay*, 8 Paige, 652; Chancery, 1844, Franklin *v. Van Cott*, 11 Paige 129; Sup'm. Ct. 1881, German Bank *v. Sharer*, 25 Hun, 409.

¹¹ Chancery, 1844, Franklin *v. Van Cott*, 11 Paige, 129.

¹² Chancery, 1844, Franklin *v. Van Cott*, 11 Paige, 129.

if he has sold, his grantee, or if he has died, his heirs or devisees are entitled, and in the absence of evidence to the contrary, the referee should so report.¹ Where the mortgagor died before foreclosure was begun leaving no personal property, the distribution may be among the general creditors, as it would be by the surrogate's court. Costs included in judgments against the administratrix not specially obtained on motion cannot be allowed.² A lessee for years with a covenant for quiet enjoyment is entitled to priority over his lessor.³ A secured mortgage continues a lien and follows the surplus.⁴ Where the referee finds that a clause reserving a life estate to the mortgagor was fraudulently introduced into the mortgage, he may reject such clause and report that as against judgment creditors the mortgage was a prior lien.⁵ A junior mortgagee is entitled to preference over a prior judgment creditor, where such mortgage was given for money to obtain title,⁶ so is an unrecorded mortgage over a subsequent judgment by confession.⁷ A recorded mortgage given to secure future endorsements is entitled to priority over subsequent judgments as to endorsements made before, as well as after the judgments.⁸ Where the proceeds of sale are insufficient to pay the bonds secured by the mortgage, one who has advanced money to pay coupons, holding them as security, cannot share in the proceeds if the holder of the bonds had no notice of the arrangement.⁹ A general lien is preferred to a subsequent specific one when there is no other fund applicable to the former.¹⁰ A judgment by confession by two partners is entitled to priority to the extent of two

¹ Chancery, 1844, *Franklin v. Van Cott*, 11 Paige, 129.

² Sup'm. Ct. 1881, *German Sav. Bank v. Sharer*, 25 Hun, 409.

³ 1871, *Clarkson v. Skidmore*, 46 N. Y. 297.

⁴ 1882, *Fleiss v. Buckley*, 90 N. Y. 286.

⁵ Sup'm. Ct. 1880, *Tator v. Adams*, 20 Hun, 131.

⁶ Sup'm. Ct. Sp. T. 1847, *Tallman v. Farley*, 1 Barb. 280.

⁷ Sup'm. Ct. 1859, *Thomas v. Kelsey*, 30 Barb. 268.

⁸ 1881, *Ackerman v. Hunsicker*, 85 N. Y. 43.

⁹ 1875, *Union T. Co. v. M. & P. J. Co.* 63 N. Y. 311.

¹⁰ Sup'm. Ct. 1847, *Mechanics Bank v. Edwards*, 1 Barb. 271; 2 Barb. 545.

thirds over subsequent judgments against three.¹ A judgment creditor of a firm has priority over a junior judgment creditor of a partner where the real estate of the firm is sold under foreclosure.² A creditor under a surrogate's decree is preferred to legatees.³ A mechanic's lien continues against the surplus.⁴ The report is not conclusive on the court. It may be confirmed, set aside, or sent back for further evidence or a further report.⁵ The moneys stand in the place of land for the purposes of distribution.⁶

¹ Sup'm. Ct. 1859, *Stevens v. Bank of Cent. N. Y.* 31 Barb. 290.

² Com. Pl. Sp. T. 1887, *N. Y. L. I. Co. v. Mayer*, 19 Abb. N. C. 92.

³ Sup'm. Ct. Chamb. 1862, *Clark's Case*, 15 Abb. 227.

⁴ 1878, *Emigrant Bank v. Goldman*, 75 N. Y. 127.

⁵ Sup'm. Ct. 1874, *M. L. I. Co. v. Salem*, 3 Hun, 117.

⁶ 1887, *Delafield v. White*, 19 Abb. N. C. 104.

CHAPTER II.

REFERENCES IN ACTIONS TO FORECLOSE A MECHANIC'S LIEN.

An action to foreclose a mechanic's lien is brought in the same manner, and the procedure is the same as in an action to foreclose a mortgage on real property.¹ Such action may be referred by consent,² and the court may compel a reference against the will of either or both parties where a long account is necessarily involved.³ The proceedings to obtain the order, and the moving papers are the same as in other actions.⁴ The order must be made by the court,⁵ and must be to hear and determine all the issues.⁶ The hearing is brought on in the same manner, the proceedings before the referee are the same, and the referee has the same powers and duties as in other references to hear and determine.⁷ The proceedings are *strictissimi juris*,⁸ and the plaintiff must aver and prove, and the referee must find all the facts requisite to the acquisition of a valid lien on the premises.⁹ The report must show, by reference or otherwise, the nature of the property or the interest of defendant therein to which the lien attaches, the exact estate that is to be sold under the foreclosure thereof,¹⁰ the interest of the parties therein,¹¹ that

¹ L. 1885, Ch. 342, § 8.

² Code Civ. Proc. § 1011; P. 4 *ante*.

³ Code Civ. Proc. § 1013; Sup'm. Ct. 1877, *Tooker v. Rinaldo*, 11 Hun, 154.

⁴ *Ante*, Part I, Ch. IV. P. 22.

⁵ *Ante*, Part I, Ch. V. Section 2, P. 29.

⁶ Com. Pl. Sp. T. 1875. *Sheahy v. Tomlinson*, 1 Week. Dig. 24.

⁷ *Ante*, Part I, Ch. VI. P. 32 *et seq.*

⁸ Sup'm. Ct. 1851, *Taylor v. Baldwin*, 10 Barb. 626; N. Y. Super.

1873, *Kechler v. Stumme*, 36 Super. 337; Com. Pl. 1852, *Beals v. Congregation*, 1 E. D. S. 654.

⁹ N. Y. Super. Sp. T. 1882, *Southard v. Lavelle*, 4 Law Bul. 30; N. Y. Super. 1863, *Kechler v. Stumme*, 36 Super. 337; L. 1885, Ch. 348, § 4.

¹⁰ Com. Pl. Sp. T. 1857, *Duffy v. McManus*, 3 E. D. S. 657.

¹¹ Sup'm. Ct. 1874, *Jenks v. Parsons*, 2 Hun, 667; Com. Pl. 1859, *Bailey v. Johnson*, 1 Daly 61, Com. Pl. 1857, *Sinclair v. Fitch*, 3 E. D. S. 677.

there was a contract, express or implied, to furnish the work, labor, materials, or services, for which the lien is claimed;¹ that such work, labor, or services have been rendered, or the materials furnished thereunder;² that the contract has been performed to the extent of the amount claimed, and that the same is actually due thereunder,³ for such materials, or work, labor, and services upon the building or premises, under the contract.⁴ If it be sought to hold the owner by reason of his assent to the contract, or to the expenditure for which the lien is claimed, such assent must be averred, proven, and found by the referee.⁵ It must further affirmatively appear that the notice of lien was verified before filing,⁶ that it was duly filed before the beginning of the action,⁷ and that a copy thereof was duly served upon the owner within ten days after the filing, in accordance with the statute.⁸ The date of filing should appear.⁹ If the action was by an employee, or a sub-contractor, that the articles for which the lien is claimed were furnished in accordance with the contract between the owner and contractor,¹⁰ and that by the terms of the contract a payment has become due to the contractor.¹¹ Since the proceeding for the foreclosure of a lien is an action,¹² the general provisions as to making and filing the report apply.¹³ The fees of the referee are the same,¹⁴ and judgment is to be entered on the report without application to the court.¹⁵ The court may appoint a referee to sell, and

¹ L. 1885, Ch. 342, § 4.

² L. 1885, Ch. 342, § 4.

³ L. 1885, Ch. 342, § 4; Com. Pl. 1884, *Leiegne v. Schwarzler*, 10 Daly, 547; Com. Pl. 1859, *Bailey v. Johnson*, 1 Daly, 61; Com. Pl. 1855 *Jacques v. Morris*, 2 E. D. S. 639.

⁴ Com. Pl. Sp. T. 1878, *Watrous v. Elmendorf*, 55 How. 461.

⁵ 1879, *Burkett v. Harper*, 79 N. Y. 273.

⁶ L. 1885, 342, § 4; Com. Pl. 1857, *Conklin v. Wood*, 3 E. D. S. 662.

⁷ L. 1885, Ch. 342, § 7; Com. Pl. 1859, *Bailey v. Johnson*, 1 Daly, 61.

⁸ L. 1885, Ch. 342, § 4.

⁹ Com. Pl. Sp. T. 1852, *McSorley v. Hogan*, 1 C. R. N. S. 285.

¹⁰ Com. Pl. 1852, *Doughty v. Devlin*, 1 E. D. S. 625; Com. Pl. 1855, *Quinn v. Mayor*, 2 E. D. S. 558; Com. Pl. 1855, *Broderick v. Poillon*, 2 E. D. S. 554; Com. Pl. 1854, *Dixon v. La Farge*, 1 E. D. S. 722.

¹¹ Com. Pl. 1884, *Leiegne v. Schwarzler*, 10 Daly, 547; Com. Pl. 1859, *Bailey v. Johnson*, 1 Daly, 61.

¹² L. 1885, Ch. 342, § 8.

¹³ *Ante*, Part I, Ch. VIII. P. 54.

¹⁴ *Ante*, P. 62.

¹⁵ Com. Pl. Sp. T. 1879, *Ward v. Kilpatrick*, 1 Law. Bul. 31.

report the deficiency as upon sale under foreclosure,¹ and his powers and duties are the same as in foreclosure cases,² where the owner admits that a certain amount, but not sufficient to satisfy all the liens, is due from him, the proceedings are similar to those on a reference as to surplus moneys in foreclosure.³

CHAPTER III.

REFERENCES IN PROCEEDINGS AGAINST SHIPS AND VESSELS.

A referee may be appointed to hear and determine the issues in proceedings to enforce demands against ships and vessels;⁴ the powers and duties of such referee are the same as on the trial of a civil action,⁵ and an appeal therefrom may be taken therefrom in the same manner.⁶ This statute does not apply to claims cognizable in a court of admiralty,⁷ but the mere fact that the proceeding is *in rem* does not determine whether the claim is cognizable in admiralty.⁸ The proceedings will lie for work, labor and services done and rendered, and materials furnished in building a vessel.⁹ The words "ships and vessels" are used in their ordinary sense; the statute has no application to small craft, such as row boats, sail boats, scows, &c.;¹⁰ nor does it apply where the vessel is being built in another state, al-

¹ County Court, Monroe Co. 1877, Hamill, 43 N. Y. 554; 1881, Poucher v. Mills, 2 Abb. N. C. 114. v. Blanchard, 86 N. Y. 256.

² *Ante*, P. 157, *et seq.*

⁸ 1871, Brookman v. Hamill, 43

³ Com. Pl. 1873, Hubbell v. N. Y. 554; Vose v. Cockroft, 44 N. Schleyer, 4 Daly, 362; *ante*, P. 166. Y. 415.

⁴ L. 1862, Ch. 482, § 23.

⁹ 1880, Wilson v. Lawrence, 82 N.

⁵ L. 1862, Ch. 482, § 23; see P. 32, Y. 409; 1877, King v. Greenway, 71 *ante*. N. Y. 413.

⁶ L. 1862, Ch. 482, § 24.

¹⁰ Sup'm. Ct. 1819, Birkbeck v.

⁷ 1868, *In re* Steamboat Josephine, Hoboken Boats, 17 Johns. 54; 39 N. Y. 19; 1871, Brookman v. Sup'm. Ct. 1830, Farmer's Delight v. Lawrence, 5 Wend. 564.

though the debt was contracted in New York.¹ A canal boat is within the act.² That the work was done upon the personal credit of the owner, and time for payment given does not affect the right to the lien,³ nor, it seems, does consent to the departure of the vessel from port.⁴ The justices of the N. Y. Superior court have jurisdiction to issue the warrant of attachment.⁵ The remedy is cumulative,⁶ but gives no rights to the employees of one who has made repairs.⁷ The specifications of the lien must be specific and definite, otherwise the court obtains no jurisdiction.⁸ A debt is not, within the act, contracted for provisions and stores until they are actually delivered.⁹ Since the proceedings are the same as in an action the order must be made by the court, and must be to hear and determine.¹⁰ The report will be similar to the report of a referee on the foreclosure of a mechanics' lien;¹¹ if under section 18 a referee is appointed to make distribution the proceedings will be similar to those on a reference as to surplus moneys in foreclosure.¹²

¹ 1875, *Moore v. Lunt*, 60 N. Y. Y. 649, below 1 Hun, 650, 4 T. & C. 154.

² Sup'm. Ct. 1875, *Emmons v. Wheeler*, 5 T. & C. 617; 1877, *King v. Greenway*, 71 N. Y. 413; Sup'm. Ct. 1855, *Nelson v. Yates*, 37 Hun, 52.

³ 1872, *Happy v. Mosher*, 48 N. Y. 313; 1874, *Mott v. Lansing*, 57 N. Y. 112.

⁴ 1874, *Mott v. Lansing*, 57 N. Y. 112.

⁵ N. Y. Super. 1866, *Delany v. Brett*, 27 Super. 712; 1 Abb. N. S. 421.

⁶ 1875, *Scott v. Delahunt*, 65 N. Y. 128.

⁷ Sup'm. Ct. 1878, *Fralick v. Betts*, 13 Hun, 632.

⁸ Sup'm. Ct. 1885, *Nelson v. Yates*, 37 Hun, 52.

⁹ 1850, *Veltman v. Thompson*, 3 N. Y. 438.

¹⁰ *Ante*, PP. 9, 29.

¹¹ *Ante*, P. 172.

¹² *Ante*, P. 166.

CHAPTER IV.

REFERENCES IN ACTIONS FOR DOWER.

SECTION 1.—Reference of issues in an action for dower.

SECTION 2.—Reference to admeasure dower.

SECTION 3.—Report of referee to admeasure dower.

SECTION 4.—Reference as to damages in dower.

SECTION 5.—Other references in actions for dower.

§ 1. **Reference of Issues in an Action for Dower.**—An action for dower, like any other action, may be referred;¹ or in a proper case by order of the court, against the will of the parties;² but the referee of the issues cannot be directed to ascertain and report whether the premises are so situated that a distinct parcel cannot be admeasured and laid off for the plaintiff as tenant in dower without material injury to other parties.³ The appointment of the referee, and his powers and duties are the same as in other references,⁴ and judgment may be entered in the same manner;⁵ although the usual practice is to enter judgment only by the direction of the court.⁶

§ 2. **Reference to Admeasure Dower.**—An interlocutory judgment in an action for dower deciding that plaintiff is entitled thereto, may designate a referee to admeasure dower in the lands described in the judgment.⁷ Before entering on his duties, such referee must take, subscribe and file with the clerk an oath that he will faithfully, honestly and impartially discharge the trust reposed in him.⁸ He may at any time be removed by the court,

¹ Code Civ. Proc. §§ 1011, 1012.

² Code Civ. Proc. § 1013.

³ Sup'm. Ct. 1886, *O'Dougherty v. Remington Paper Co.*, 42 Hun, 192.

⁴ *Ante*, Pp. 9, 29, 32, 35.

⁵ *Ante*, P. 72.

⁶ *Ante*, P. 74.

⁷ Code Civ. Proc. § 1607.

⁸ Code Civ. Proc. § 1608.

and in case of his death, resignation, removal, neglect or refusal to serve, the court may from time to time appoint another.¹ The referee must, if practicable, and in his opinion for the best interest of all the parties concerned, admeasure and lay off, as speedily as possible, as the dower of the plaintiff, a distinct parcel, constituting one-third part of the real property of which dower is to be admeasured, designating the part so laid off by posts, stones, or other permanent monuments.² In making such admeasurement, he must take into consideration any permanent improvements made upon the real property after the death of plaintiff's husband, or after the alienation thereof by him; and if practicable, those improvements must be awarded with in the part not laid off to the plaintiff; or, if it is not practicable so to award them, a deduction must be made from the part laid off to the plaintiff, proportionate to the benefit which she will derive from so much of those improvements as is included in the part laid off to her.³ A surveyor, with the necessary assistants, may be employed to aid in the admeasurement.⁴ The parties are entitled to notice of the proceedings, but where they had actual knowledge, confirmation of the report will not be refused on the sole ground that no formal notice was given.⁵ Where the heir, on request, refused to point out the premises to the commissioners, or to do anything in the matter, further notice was held unnecessary.⁶ Where the reference to admeasure was ordered after recovery by the widow in ejectment, notice to the attorneys is sufficient.⁷ Where the husband held a portion in severalty and another portion as tenant in common, the referee may set off one-third of that held in severalty by metes and bounds, to be held by the widow in severalty, and assign one-third of her husband's interest in the other parcels, to be held by her as tenant in common with the other owners.⁸ Where the

¹ Code Civ. Proc. § 1608.

² Code Civ. Proc. § 1609.

³ Code Civ. Proc. § 1609.

⁴ Code Civ. Proc. § 1609.

⁵ Sup'm. Ct. 1872, *Smith v. Smith*,
6 Lans. 313.

⁶ Sup'm. Ct. 1812, *Matter of Watkins*, 9 Johns, 245.

⁷ Ct. App. 1863, *Stewart v. Smith*, 1 Keyes, 59.

⁸ Sup'm. Ct. 1872, *Smith v. Smith*,
6 Lans, 313.

property is of such a nature that it cannot be equitably divided, it may be so assigned as to give the widow one-third of the rents, or an alternate occupation of the whole.¹ Where the premises consisted of a dwelling-house, and the referee assigned specified rooms therein, it was held the widow might object, but the tenant could not;² and where the premises consisted of a dwelling-house and store, and the dower was assigned in such a way as to make the building practically useless, the referee's report may be set aside on application of the owner of the freehold.³ Where there are several distinct parcels, the widow cannot insist upon a separate portion of each where the interests of others would be seriously affected. The whole dower may be assigned from one parcel.⁴ Stakes and boundaries will control courses and distances. Property outside the boundaries fixed will be regarded as undivided.⁵ The title cannot be controverted before the referee to admeasure.⁶ Where the property was alienated during the life of the husband the dower should be computed upon the value at the time of such alienation; subsequent improvements cannot be included.⁷ The better practice is to determine the question of value at the time of the trial, leaving the question of improvements to the referee.⁸ If there were mines on the property, unopened at the death of the husband, the widow can have dower only in other lands. If opened before his death, the referee must estimate the

¹ Sup'm. Ct. 1823, *Coates v. Y.* 105; Sup'm. Ct. 1830, *Hyde v. Cheever*, 1 Cow. 460.

² Sup'm. Ct. 1842, *White v. Story*, 2 Hill, 543; N. Y. Surr. 1856, *Parks v. Hardey*, 4 Bradf. 15.

³ Ct. App. 1864, *Stewart v. Smith*, 1 Keyes, 59; below 39 Barb. 167.

⁴ Sup'm. Ct. 1886, *Price v. Price*, 41 Hun, 486.

⁵ Sup'm. Ct. 1875, *Jones v. Carroll*, 5 T. & C. 631.

⁶ Sup'm. Ct. 1842, *Matter of Watkins*, 9 Johns, 245; N. Y. Surr. 1856, *Parks v. Hardey*, 4 Bradf. 15; Ct. App. 1865, *Wood v. Seely*, 32 N.

⁷ Code Civ. Proc. § 1609; Sup'm. Ct. 1867, *Marble v. Lewis*, 53 Barb. 432; 36 How. 337; N. Y. Super. 1866, *Brown v. Brown*, 27 Super. 688; Sup'm. Ct. 1823, *Coates v. Cheever*, 1 Cow. 460; Chancery; 1843, *Bell v. Mayor*, 10 Paige, 49; Sup'm. Ct. 1880, *Raynor v. Raynor*, 21 Hun, 36.

⁸ Sup'm. Ct. 1867, *Marble v. Lewis*, 53 Barb. 432; 36 How. 337; Sup'm. Ct. 1833, *Gates v. Paddock*, 10 Wend. 528.

value so far as opened before that time, and assign them by admeasuring one-third in value, or a reasonable part of the profits at short periods.¹ A conveyance made by the husband to the wife during marriage does not diminish the dower;² nor does a mortgage paid by a grantee, unless he claims under the mortgage.³ Surplus moneys on foreclosure are regarded as real estate, and the widow is to be endowed of one-third of such surplus, over and above principal, interest and costs,⁴ and is not chargeable with taxes or assessments unpaid before assignment of dower, if there was personal estate sufficient to pay them.⁵ Where the widow redeems from a mortgage, the admeasurement must be in accordance with the provisions of the statute (now section 1609 of the Code of Civil Procedure).⁶ Where the proceedings are in the surrogate's court, a counter-claim against the widow for moneys due the estate from her cannot be interposed, unless she has consented to receive a gross sum in lieu of dower.⁷ Where a wife joined in a deed which was in fact a mortgage, and the grantee re-conveyed to the husband, who gave a new mortgage in which the wife did not join, the widow was held entitled to dower in the entire fee.⁸ If it is not practicable, or if in the opinion of the referee it is not for the best interests of all the parties concerned to admeasure and lay off a distinct parcel, he must report that fact to the court;⁹ but such report is not conclusive thereon.¹⁰

§ 3. Report of Referee to Admeasure Dower.—The referee must make a full report of his proceedings, specifying therein the manner in which he has performed his trust,

¹ Sup'm. Ct. 1823, *Coates v. Cheever*, 1 Cow. 460. ¹⁷⁸; Sup'm. Ct. 1870, *Harrison v. Peck*, 56 Barb. 251.

² Sup'm. Ct. 1830, *Hyde v. Hyde*, 4 Wend. 630. ⁶ Chancery, 1843, *Bell v. Mayor*, 10 Paige, 49.

³ Sup'm. Ct. 1882, *Bartlett v. Musliner*, 28 Hun, 235. ⁷ N. Y. Surr. 1877, *Taylor v. Bentley*, 3 Redf. 34.

⁴ N. Y. Surr. 1877, *Taylor v. Bentley*, 3 Redf. 34. ⁸ Sup'm. Ct. 1883, *Taylor v. Post*, 30 Hun, 446.

⁵ N. Y. Surr. 1877, *Taylor v. Bentley*, 3 Redf. 34; Chancery, 1838, *Williams v. Cox*, 3 Edw. Ch.

⁹ Code Civ. Proc. § 1609, par. 3. ¹⁰ Sup'm. Ct. 1886, *Price v. Price*, 41 Hun, 486.

with the items of his charges, and a particular description of the portion admeasured and laid off to the plaintiff, or if he reports that it is not practicable, or in his opinion it is not for the best interests of all the parties concerned to admeasure and lay off a distinct parcel of the property of which dower is to be admeasured, he must state the reasons for that opinion, and all the facts relating thereto. The report must be acknowledged, or proved and certified, in like manner as a deed to be recorded, and must be filed in the office of the clerk.¹ The general form of the report and the proceedings thereon are the same as in other interlocutory references.² Upon application of any party to the action, and upon good cause shown, the court may set aside the report, and if necessary, may appoint a new referee, who must proceed as prescribed.³ The fees and expenses of the referee, including the expense of a survey, where made, must be taxed under the direction of the court, and the amount thereof must be paid by the plaintiff, and allowed to her upon the taxation of her costs.⁴ The fees of a surveyor, if employed, are five dollars per day for each day actually and necessarily employed in surveying, laying out, marking or mapping land therein, and of his assistant two dollars per day.⁵ The fees of a commissioner to admeasure, five dollars for each day's actual and necessary service.⁶ The fees of a referee for a similar service are nowhere fixed, unless by the section fixing the fees of referees generally.

§ 4. **Reference as to Damages in Dower.**—Where the widow recovers dower, in a case not specified in section 1601, she may also recover, in the same action, damages for withholding, to be computed from the commencement of the action; ⁷ these damages include nothing for the use of permanent improvements made after the property was aliened by the husband. In all other respects the computation

¹ Code Civ. Proc. § 1610.

² *Ante*, P. 88.

³ Code Civ. Proc. § 1611.

⁴ Code Civ. Proc. § 1612.

⁵ Code Civ. Proc. § 3299.

⁶ Code Civ. Proc. § 3299.

⁷ Code Civ. Proc. § 1600.

must be made as prescribed in section 1600.¹ A defendant is not occupying or claiming a right to occupy the premises, not liable for damages.² Where the widow recovers dower in real property aliened by the heir of the husband, she may recover, in a separate action against him, her damages for withholding her dower, from the time of the death of the husband to the time of alienation, not exceeding six years in all. The sum recovered from him must be deducted from what she would otherwise be entitled to recover against the grantee; the amount she may recover against the grantee must be deducted from what she would otherwise be entitled to recover from the heir.³ The acceptance by the widow of an assignment of dower in satisfaction of her claim upon the property in question bars an action for dower, and may be pleaded by any defendant.⁴ The statute gives the right to damages, and furnishes the sole rule for computation;⁵ the profits are not recoverable until dower has been assigned.⁶ Where the property was sold during the life of the husband, she is entitled to one-third in value at the time of alienation;⁷ she is entitled to the crops growing on the land assigned to her for dower.⁸ The heir may voluntarily assign dower, and for the purpose of computing damages such assignment is equivalent to judgment therefor.⁹ The damages are to be assessed upon the heirs and *terre* tenants according to the time of their enjoyment of the land.¹⁰ The widow takes free from any claim for taxes levied thereon prior to the death of her husband.¹¹ Where there is an outstanding encumbrance to which the widow was a party, she can have dower only in the equity of redemption.¹² Where the widow consents

¹ Code Civ. Proc. § 1601.

² Code Civ. Proc. § 1602.

³ Code Civ. Proc. § 1603.

⁴ Code Civ. Proc. § 1604.

⁵ 1876, *Kyle v. Kyle*, 67 N. Y. 400.

⁶ 1876, *Kyle v. Kyle*, 67 N. Y. 400.

⁷ Sup'm. Ct. 1867, *Marble v. Lewis*, 53 Barb. 432; 36 How. 337.

⁸ Sup'm. Ct. 1873, *Clark v. Bat-*

torf, 1 T. & C. 58; 1852, *Kain v. Fisher*, 6 N. Y. 597.

⁹ 1876, *Kyle v. Kyle*, 67 N. Y. 400.

¹⁰ Chancery, 1820, *Hazen v. Thurber*, 4 J. Ch. 604; Sup'm. Ct. 1861, *Van Name v. Van Name*, 23 How. 247.

¹¹ Sup'm. Ct. 1870, *Harrison v. Peck*, 56 Barb. 251.

¹² Chancery, 1828, *Russell v. Austin*, 1 Paige. 192.

to take a gross sum from surplus moneys in foreclosure she is not chargeable with any of the costs, charges, or expenses of receiving or paying over said sum.¹ The mesne profits consist of the net rents after deducting all necessary repairs and taxes, or the net rental value, or the value of the use and occupation,² and interest to the time of trial.³ The compensation is to be adjusted as upon contract and not upon the footing of a tort,⁴ and at the rate actually received by the defendant while the moneys were in his hands.⁵ The form of the report of the referee as to damages in dower is nowhere specifically prescribed. As a matter of precaution it may be well to follow the directions of section 1610 of the code of civil procedure. In all other respects the general form of the report on an interlocutory reference may be followed.⁶

§ 5. **Other References in Dower.**—When plaintiff has filed her consent to accept a gross sum in lieu of dower, and any defendant has applied for an order granting leave to pay such sum, the court may, in its discretion, and upon such terms as justice requires, appoint a referee to ascertain the value of plaintiff's right of dower in the premises;⁷ where the consent to accept a gross sum has been filed, and she is entitled to an interlocutory judgment in the action, a referee may be appointed to ascertain whether a distinct parcel of such property can be admeasured and laid off without material injury to the interests of the parties.⁸ If such distinct parcel cannot be admeasured and laid off, a referee may be appointed to sell the property;⁹ before such sale is ordered a reference must be ordered to ascertain whether any person not a party has a lien upon such property or any part thereof. The proceedings in such reference are the same as on a similar reference in

¹ Sup'm. Ct. Sp. T. 1872, Campbell v. Erving, 43 How. 258.

² 1885, Wallace v. Berdell, 101 N. Y. 13; 3 N. E. Rep. 769; 3 East. Rep. 327.

³ Code Civ. Proc. § 1600; 1867, Vandervoort v. Gould, 36 N. Y. 639.

⁴ 1859, Holmes v. Davis, 19 N. Y. 488.

⁵ Sup'm. Ct. 1886, Withaus v. Schack, 38 Hun, 560.

⁶ Ante, P. 88.

⁷ Code Civ. Proc. § 1618.

⁸ Code Civ. Proc. § 1619.

⁹ Code Civ. Proc. § 1619.

partition.¹ The powers and duties of the referee to sell are the same as those of a referee in foreclosure.² Immediately after completing the sale and executing the proper conveyance to the purchaser, the officer making the sale must make and file with the clerk a report thereof, showing the name of the purchaser and the purchase price paid by him, or if the property was sold in parcels the name of each purchaser, and the price and a description of the parcel sold to him; the sums which the officer has paid out of the proceeds of the sale pursuant to the interlocutory judgment; the purpose for which each payment was made; the amount and items of his fees and expenses; and the net amount of the proceeds, after deducting the payments.³

¹ Code Civ. Proc. § 1621.

³ Code Civ. Proc. § 1623.

² *Ante*, P. 164.

CHAPTER V.

REFERENCES IN ACTIONS FOR PARTITION.

SECTION 1.—Reference of issues in an action for partition.

SECTION 2.—Reference to sell in partition.

§ 1. **Reference of Issues in an Action for Partition.**—All the issues in an action for partition may be sent to a referee to hear and determine by consent of the parties.¹ Such consent will be presumed, though not shown, where the reference is allowed to proceed to judgment without objection;² but if objection is made, the issues must be tried by a jury.³ If a reference to hear and determine be ordered, the proceedings are the same as in other actions referred by consent, and judgment is perfected in the same manner;⁴ but the usual practice where a reference is had in this and similar actions is to enter judgment only upon confirmation of the report.⁵ Where defendant has made default in appearing or pleading, or where an infant is a party, a reference may be had to ascertain the rights, shares, and interests of the several parties in the property before an interlocutory judgment is rendered.⁶ The application must be on notice to those who have appeared, and an affidavit showing that the interests as stated in the complaint are not denied or controverted, and if any of the defendants are infants, or absentees, or unknown to the plaintiff, that fact must also

¹ Code Civ. Proc. §§ 1011, 1012.

² 1875, *Macy v. Nelson*, 62 N. Y. 638.

³ Code Civ. Proc. § 1544; Sup'm. Ct. Sp. T. 1881, *Cassery v. Wallace*, 61 How. 240.

⁴ Code Civ. Proc. § 1228; P. 72, *ante*.

⁵ 1875, *Macy v. Nelson*, 62 N. Y. 638; N. Y. Super. Sp. T. 1879, *Hathaway v. Russell*, 45 Super. 538; again 46 Super. 103; 1874, *Austin v. Ahearne*, 61 N. Y. 6.

⁶ Code Civ. Proc. § 1545.

be stated.¹ Where the answer is a nullity, a reference as on default may be ordered.² The referee must be selected by the court, must be directed to take proof of plaintiff's title and interest in the premises, and of the several matters set forth in the complaint, to ascertain and report the rights and interests of the several parties in the premises, and an abstract of the conveyances by which the same are held.³ The referee may also be directed to inquire and report whether the whole premises, or any separate lot or parcel thereof, are so circumstanced that an actual partition thereof cannot be made, and if he finds that a sale of the whole premises, or any separate lot or parcel, will be necessary, that he specify the same in his report, together with the reasons that made a sale necessary; and if a sale be found necessary, that he also ascertain and report whether any individual not a party has a specific lien by mortgage, devise or otherwise upon the undivided share or interest of any party.⁴ The clause as to advertising for liens may, in

¹ Rule 66; Code Civ. Proc. § 1545.

² Sup'm. Ct. 1881, *Nolan v. Skelly*, 62 How. 102.

³ Code Civ. Proc. § 1545; Rule 66.

⁴ Code Civ. Proc. § 1561.

“Where the whole premises of which partition is sought, are so circumstanced that a partition thereof cannot be made without great prejudice to the owners, due regard being had to the power of the court to decree compensation to be made for equality of partition, and to the ability of the respective parties to pay a reasonable compensation to produce such equality, or where any lot, or separate parcel of the premises, which will exceed in value the share to which either of the tenants in common may be entitled is so circumstanced, the complainants, upon stating the fact in the affidavit which is to be filed for the purpose of obtaining an order of reference

under the next preceding rule, may have a further provision inserted in such order of reference, directing the master to enquire and report whether the whole premises, or any lot or separate parcel thereof, are so circumstanced that an actual partition cannot be made; and that if the master arrives at the conclusion that a sale of the whole premises or of any lot or parcel thereof will be necessary, that he specify the same in his report, together with the reasons which render a sale necessary; and in such a case that he also ascertain and report whether any creditor not a party to the suit has a specific lien, by mortgage, devise or otherwise, upon the undivided share or interest of any of the parties in that portion of the premises which it is necessary to sell; and if he finds that there is no such specific lien in favor of any person not a party to the suit, that he fur-

the discretion of the court, be dispensed with where a party produces a search, certified by the clerk and register, as the case requires, of the county where the property is situated, and it appears therefrom and the affidavits, if any produced therewith, that there is no such lien.¹ Where the reference is to ascertain and report, the proceedings before the referee are conducted in the same manner, and the powers and duties of the referee are the same as on other interlocutory references.² The plaintiff should produce an abstract of title as tenant in common back to a common source.³ It must be such a one as would entitle him to recover in ejectment.⁴ Where the referee is directed to ascertain liens, he must advertise as prescribed by statute.⁵ The validity of the liens presented may be contested, although there is no issue in the pleadings in respect thereto.⁶ An agreement that a tenant shall be paid for buildings erected by him on the premises may be treated as an equitable charge.⁷ So may a claim for necessary improvements that have greatly increased the value of the

ther enquire and report whether the undivided share or interest of any of the parties in premises is subject to any general lien or encumbrance, by judgment or decree; and that he ascertain and report the amount due to any party to the suit who has either a general or a specific lien on the premises to be sold, or any part thereof, and the amount due to any creditor, not a party, who has a general lien on any undivided share or interest therein, by judgment or decree, and who shall appear and establish his claim on such reference. The master, if requested by the parties who appear before him on such reference, shall also ascertain and report the amount due to any creditor, not a party to the suit, which is either a specific or general lien or incumbrance upon all the shares or interests of the parties in the premises to be sold, and which would re-

main as an incumbrance thereon in the hands of the purchaser; to the end that such directions may be given in relation to the same, in the decree for the sale of the premises, as shall be most beneficial to all the parties interested in the proceeds thereof on such sale." Chancery Rule 178.

¹ Code Civ. Proc. § 1561.

² *Ante*, P. 82.

³ Chancery, 1837, *Hamilton v. Morris*, 7 Paige, 39.

⁴ Chancery, 1830, *Larkin v. Mann*, 2 Paige, 27.

⁵ Code Civ. § 1562.

⁶ 1885, *Barnard v. Onderdonk*, 98 N. Y. 158; 1874, *Halsted v. Halsted*, 55 N. Y. 442; Chancery, 1834, *Dunham v. Minard*, 4 Paige, 441; Sup'm. Ct. 1887, *Leinen v. Elten*, 43 Hun, 249.

⁷ Sup'm. Ct. Sp. T. 1877, *Walter v. Walter*, 3 Abb. N. C. 12.

property.¹ Dower must be paid only from the proceeds of the share upon which it was a lien.² Where the referee does not advertise for liens, the parties should produce, at their own cost, searches for at least twenty years.³ The report of the referee to ascertain and report should contain only findings of fact, not conclusions of law;⁴ should contain an abstract of the conveyances of each and all the undivided shares or interests of the several parties in the premises from the time when they were united in a common source of title.⁵ It is not essential that searches be annexed, if the referee reports that he has caused search to be made, and states what encumbrances there are.⁶ The referee is bound by the pleadings, and cannot find a title different from that stated and admitted therein.⁷ It should also set forth facts showing whether or not actual partition is practicable.⁸ The report must be filed, notice given, and exceptions thereto filed within eight days to secure a right to be heard on appeal.⁹ The general form of the report is the same as on other interlocutory references.¹⁰ It is not conclusive; the court may accept or reject the findings as it deems just.¹¹

§ 2. **Reference to Sell in Partition.**—The final judgment in partition may order the sale to be made by a referee.¹² The manner of advertising and conducting the sale is the same as in an action for the foreclosure of mortgages.¹³ The terms of the judgment must be strictly complied with,¹⁴ un-

¹ 1886, *Ford v. Knapp*, 102 N. Y. 135.

² 1886, *Ford v. Knapp*, 102 N. Y. 135.

³ Code Civ. Proc. § 1561; Sup'm. Ct. Sp. T. 1853, *Hall v. Patridge*, 10 How. 188.

⁴ 1874, *Austin v. Ahearne*, 61 N. Y. 6.

⁵ Chancery, 1837, *Hamilton v. Morris*, 7 Paige, 39.

⁶ Ct. App. 1860, *Noble v. Cromwell*, 27 How. 289.

⁷ Sup'm. Ct. 1884, *McAlear v. Delany*, 19 Week. Dig. 252.

⁸ Sup'm. Ct. Chamb. 1877, *Walter v. Walter*, 3 Abb. N. C. 12.

⁹ Rule 30; 1887, *Platt v. Platt*, 105 N. Y. 488.

¹⁰ Rule 30.

¹¹ 1874, *Austin v. Ahearne*, 61 N. Y. 6; 1873, *Moore v. Met. Bank*, 55 N. Y. 41; Sup'm. Ct. 1879, *Thurber v. Chambers*, 4 Hun, 721.

¹² Code Civ. Proc. § 1560.

¹³ *Ante*, P. 157, *et seq.*

¹⁴ 1881, *Weseman v. Wingrove*, 85 N. Y. 353; 1873, *Easton v. Pickersgill*, 55 N. Y. 310; Sup'm. Ct. 1880, *Wiggins v. Howard*, 22 Hun, 126.

less waived by the parties affected by deviations therefrom.¹ The referee has no power to order a public street to be opened through the property ;² he must retain the balance of the purchase-money in his hands until the premises are cleared from liens,³ while he is not bound to search, nor is he responsible for the accuracy of liens claimed, he must take notice of all that are brought to his attention,⁴ and he may be compelled by motion made in the action to pay the purchaser the amount required to satisfy a lien of which he had knowledge, not discharged before distributing the purchase-money.⁵ When he has, with the sanction of the court, delivered a bond and mortgage instead of cash to the county treasurer to be invested as widow's dower, he cannot afterwards be compelled to receive it back and pay over money instead.⁶ Where three years have not elapsed since the death of testator, the former owner, the purchaser may have a reference to ascertain if there are any debts of the testator outstanding.⁷ The fees of a referee to sell in partition are the same as those of a sheriff, and he is entitled to the same disbursements ; where he is required to take security on a sale, or distribute, or ascertain and report on the distribution or application of any of the proceeds of the sale, he is entitled to one half commissions on the amount so secured, distributed, or applied, allowed to an executor for receiving or paying out money ; but his compensation, including commissions, cannot exceed five hundred dollars.⁸ Where he has tried the issues he is entitled to the *per diem* fees on such trial.⁹ Where the referee pays the money into court to be distributed under its

¹ Sup'm. Ct. 1880, *Wiggins v. Howard*, 22 Hun, 126..

² Sup'm. Ct. 1871, *Scott v. Guernsey*, 60 Barb. 163.

³ 1873, *Easton v. Pickersgill*, 55 N. Y. 310 ; 1881, *Weseman v. Wingrove*, 85 N. Y. 353.

⁴ 1873, *Easton v. Pickersgill*, 55 N. Y. 310 ; 1881, *Weseman v. Wingrove*, 85 N. Y. 353.

⁵ 1881, *Weseman v. Wingrove*, 85 N. Y. 353.

⁶ 1881. *Wiggins v. Howard*, 83 N. Y. 613.

⁷ Sup'm. Ct. Sp. T. 1857, *Disbrow v. Folger*, 5 Abb. 53.

⁸ Code Civ. Proc. § 3297 ; 1881, *Hobart v. Hobart*, 86 N. Y. 636 ; Sup'm. Ct. Chamb. 1875, *Richards v. Richards*, 2 Abb. N. C. 93 ; aff'd, 76 N. Y. 186 ; Sup'm. Ct. Chamb. 1877, *Daby v. Jacot*, 2 Abb. N. C. 97.

⁹ Sup'm. Ct. 1886, *Kepler v. Merkle*, 9 Civ. Proc. R. 284.

direction the referee is entitled to no commissions, but where a referee is appointed to distribute the money he is entitled to the commissions allowed.¹ So far as L. 1869, ch. 569, § 1, as amended by L. 1874, ch. 192, relates to the fees of referees it is modified by the provisions of section 3297 of the code of civil procedure;² the referee may appeal from an order made in the action fixing his fees at a sum less than he was entitled to receive;³ he may charge two dollars for drawing each deed, which sum the grantee must pay.⁴ The commissions are to be computed only on the sums actually received and paid out; it cannot be allowed on the amount of a mortgage subject to which the premises were sold.⁵ The fees are to be allowed only on completed sales; but he can charge for advertising the first sale ten dollars, and for receiving and entering the decree fifty cents.⁶ Where fees and disbursements for searches on a reference as to title are due from plaintiff's attorney to the referee to sell in the same suit, they may be allowed to the referee on the adjustment of his fees and commissions on the sale.⁷ Immediately after making the sale the referee must file with the clerk his report thereof under oath, containing a description of each parcel sold, the name of the purchaser, and the price at which it was sold.⁸ A referee to take proof, and report the amount defendants are entitled to receive of the proceeds of sale, may be ordered to take proof of liens presented;⁹ but in ascertaining who hold liens he has no authority to accept from the general assignee of the owner a waiver of the assignors right thereto;¹⁰ if he delays distribution he is chargeable with such interest as he could have obtained therefor.¹¹

¹ 1886, *Race v. Gilbert*, 102 N. Y. 298.

² Sup'm. Ct. Sp. T. 1881, *Maher v. O'Connor*, 61 How. 103.

³ 1881, *Hobart v. Hobart*, 86 N. Y. 636; 1886, *Race v. Gilbert*, 102 N. Y. 298.

⁴ 1886, *Race v. Gilbert*, 102 N. Y. 298.

⁵ Sup'm. Ct. Sp. T. 1880, *Strauss v. Hillman*, 58 How. 377.

⁶ Sup'm. Ct. 1878, *Walbridge v. James*, 16 Hun, 8.

⁷ Sup'm. Ct. Chamb. 1877, *Daby v. Jacot*, 2 Abb. N. C. 97.

⁸ Code Civ. Proc. § 1576.

⁹ Sup'm. Ct. 1886, *Platt v. Platt*, 42 Hun, 592.

¹⁰ N. Y. Super. 1864, *Ballard v. Burrows*, 25 Super. 206.

¹¹ Sup'm. Ct. 1886, *Kepler v. Merkle*, 9 Civ. Proc. R. 284.

CHAPTER VI.

REFERENCES IN MATRIMONIAL ACTIONS.

SECTION 1.—References of issues for divorce for adultery.

SECTION 2.—Proceedings to judgment.

SECTION 3.—Entering judgment.

SECTION 4.—References in default in action for divorce for adultery.

SECTION 5.—References as to alimony and counsel fees before decree.

SECTION 6.—References as to alimony after decree.

SECTION 7.—References in action for separation.

SECTION 8.—References in matrimonial actions other than for divorce or separation.

§ 1. **References of Issues in Actions for Divorce for Adultery.**—A reference of the issues in actions for divorce for adultery can be ordered only by consent of the parties.¹ The court has no power to refer against their will,² nor can it make such consent a condition of granting a favor.³ The stipulation waiving a jury trial should be in writing,⁴ should be signed by the parties or their attorneys,⁵ and filed with the clerk.⁶ It should not name the referee; the court alone has power to select him, and may name one to whom all the parties object.⁷ An order referring the cause to a referee named by the parties has been held to be voidable, not void.⁸ A consent in open court has been held equivalent to a written consent,⁹ and a stipulation signed but not

¹ Code Civ. Proc. § 1012.

² Sup'm. Ct. Sp. T. 1879, *McCrea v. McCrea*, 58 How. 220; N. Y. Super. Sp. T. 1877, *Batzel v. Batzel*, 42 Super. 561; 54 How. 139; Sup'm. Ct. 1879, *Morrell v. Morrell*, 17 Hun, 324; Sup'm. Ct. 1874, *Dietz v. Dietz*, 4 T. & C. 565.

³ Sup'm. Ct. 1863, *Cordier v. Cordier*, 26 How. 187.

⁴ Code Civ. Proc. § 1011; Sup'm.

Ct. Sp. T. 1856, *Diddell v. Diddell*, 3 Abb. 167.

⁵ Code Civ. Proc. § 1011.

⁶ Code Civ. Proc. § 1011.

⁷ Code Civ. Proc. § 1012, Rule 73.

⁸ Sup'm. Ct. 1878, *Fullmer v. Fullmer*, 6 Week. Dig. 22.

⁹ Sup'm. Ct. Sp. T. 1868, *Waterman v. Waterman*, 37 How. 36; Sup'm Ct. Sp. T. 1850, *Anonymous*, 5 How. 306.

filed, may, after the referee has made his report, be filed and an order of reference entered now for then.¹ Where the action is for divorce for adultery the moving papers must contain the affidavit required by rule 18 as to the service of the summons and complaint; notice of appearance and retainer are not sufficient.² Where the action is to dissolve the marriage on the ground that defendant has a former wife living an affidavit as to connivance, cohabitation, etc., is not necessary on motion for reference on default.³ The qualifications of the referee are the same as in other causes,⁴ and the order is entered in the same manner.⁵ The order must be to hear and determine, or to hear and decide.⁶ A reference to take proof and report cannot be made even by consent,⁷ where by the order in the first instance a referee was appointed to take evidence and report, and on the coming in of a supplemental answer the referee was by consent directed to hear and determine, it was held on appeal that the last order must stand.⁸ The referee must be sworn. The hearing is brought on in the same manner, and the general powers and duties of the referee are the same as on the trial of issues in an action at law. Husband and wife may testify for but not against each other,⁹ except to disprove the adultery.¹⁰ The referee must try all the issues presented by the pleadings,¹¹ including the adultery of plaintiff when alleged,¹² the legitimacy of the children of the marriage,¹³ the residence of the

¹ Sup'm. Ct. Sp. T. 1856, *Diddell v. Diddell*, 3 Abb. 167.

² Rule 73.

³ Chancery, 1831, *Borradaile v. Borradaile*, 1 Edw. Ch. 40.

⁴ *Ante*, P. 6.

⁵ *Ante*, P. 9.

⁶ Sup'm. Ct. Sp. T. 1868, *Waterman v. Waterman*, 37 How. 36; N. Y. Super. 1877, *Sullivan v. Sullivan*, 41 Super. 519; *Harper v. Harper*, 5 Week. Dig. 460; N. Y. Super. 1877, *Harding v. Harding*, 43 Super. 27; Sup'm. Ct. 1883, *McCleary v. McCleary*, 30 Hun, 154; N. Y. Super.

Sp. T. 1871, *Merrill v. Merrill*, 11 Abb. N. S. 74; N. Y. Super. Sp. T. 1866, *Lincoln v. Lincoln*, 29 Super. 525.

⁷ N. Y. Super. Sp. T. *Harper v. Harper*, 5 Week. Dig. 460.

⁸ Com. Pl. 1886, *Bliss v. Bliss*, 1 N. Y. St. Rep. 281.

⁹ Sup'm. Ct. 1886, *Bailey v. Bailey*, 41 Hun, 424.

¹⁰ Code Civ. Proc. § 831.

¹¹ Sup'm. Ct. 1871, *Price v. Price*, 9 Abb. N. S. 291; Sup'm. Ct. 1861, *Linden v. Linden*, 36 Barb. 61.

¹² Rule 75.

¹³ Rule 76.

parties and when and where the marriage was contracted,¹ whether five years have elapsed since the discovery of the alleged adultery, and whether the same was committed without the consent, connivance, privity, or procurement of the plaintiff.² As to these facts the plaintiff must be examined.³ It has been held that the allegation of these particulars in a verified complaint was sufficient to throw the burden of proof to the contrary on defendant.⁴ The power of the referee is limited by the order; he has no authority to hear and determine unless it is expressly given.⁵

§ 2. **Proceedings to Judgment.**—The report must state findings of facts and conclusions of law separately;⁶ must show that the parties were present in person or by counsel, or had notice of the proceedings.⁷ Judgment cannot be ordered by consent;⁸ or on default, or failure to appear at the hearing;⁹ or on admissions of the parties;¹⁰ unless such confessions or admissions are made under circumstances which entirely preclude suspicions of collusion.¹¹ The provisions of the statute must be strictly fol-

¹ Code Civ. Proc. §§ 1756, 1757.

² Code Civ. Proc. § 1758; Rule 73; Sup'm. Ct. 1863, *Myers v. Myers*, 41 Barb. 114; Sup'm. Ct. Sp. T. 1886, *Zadok v. Zadok*, Daily Reg. July 14, 1886.

³ Rule 73; Sup'm. Ct. Sp. T. 1886, *Zadok v. Zadok*, Daily Reg. July 14, 1886.

⁴ Sup'm. Ct. 1863, *Myers v. Myers*, 41 Barb. 114; Com. Pl. Sp. T. 1881, *Farace v. Farace*, 61 How. 61; see, also, *Hennessey v. Hennessey*, 58 How. 304.

⁵ N. Y. Super. 1871, *Merrill v. Merrill*, 11 Abb. N. S. 74; Sup'm. Ct. 1877, *Sullivan v. Sullivan*, 41 Super. 519.

⁶ Code Civ. Proc. § 1022; N. Y.

Super. 1883, *Glick v. Glick*, 5 Law Bul. 62; Sup'm. Ct. 1880, *Schroeter v. Schroeter*, 23 Hun, 230; Sup'm. Ct. 1883, *McCleary v. McCleary*, 30 Hun, 154; N. Y. Super. Sp. T. 1877, *Sullivan v. Sullivan*, 41 Super. 519; 52 How. 453.

⁷ N. Y. Super. 1877, *Sullivan v. Sullivan*, 41 Super. 519; 52 How. 453.

⁸ Code Civ. Proc. §§ 1012, 1753; Rule 73; Chancery, 1815, *Williamson v. Williamson*, 1 J. Ch. 488; Rule 77.

⁹ Rule 77.

¹⁰ Chancery, 1848, *Montgomery v. Montgomery*, 3 Barb. Ch. 132.

¹¹ Sup'm. Ct. 1861; *Lyon v. Lyon*, 62 Barb. 168.

lowed;¹ nothing can be taken by intendment.² The referee must find on all the material issues made by the pleadings.³ Denial and condonation are separate issues.⁴ It must appear whether or not five years have elapsed since the discovery of the alleged adultery, and whether or not the same was committed without the consent, connivance, privity, or procurement of plaintiff;⁵ and as to these facts plaintiff must be examined.⁶ The parties are competent to prove the marriage;⁷ to give evidence in favor of, but not against each other,⁸ except to disprove the allegation of adultery,⁹ and to prove that no action for divorce had ever before been begun, and decree entered.¹⁰ The testimony of the witnesses must be signed by them,¹¹ and certified with other proceedings to the court with the report.¹² Direct proof of adultery is not necessary; it may be proved by circumstances that lead to it by fair inference;¹³ but such circumstances must lead to it as a necessary conclusion; appearances equally capable of two interpretations are insufficient.¹⁴ Full and sufficient opportunity are insufficient without proof of acts of familiarity and lascivious conduct;¹⁵ evidence of familiarity with the alleged paramour

¹ N. Y. Super. 1877, *Sullivan v. Sullivan*, 41 Super. 519; 52 How. 453; N. Y. Super. 1877, *Harding v. Harding*, 43 Super. 27; Sup'm. Ct. Sp. T. 1873; *Blott v. Rider*, 47 How. 90; Sup'm. Ct. 1883, *McCleary v. McCleary*, 30 Hun, 154.

² Sup'm. Ct. 1861, *Linden v. Linden*, 36 Barb. 61.

³ Sup'm. Ct. 1871, *Price v. Price*, 9 Abb. N. S. 291; Code Civ. Proc. § 1221; Sup'm. Ct. 1861, *Linden v. Linden*, 36 Barb. 61.

⁴ Sup'm. Ct. Sp. T. 1847, *Morrell v. Morrell*, 1 Barb. 318; see same case 3 Barb. 236.

⁵ Rule 73; Sup'm. Ct. 1863, *Myers v. Myers*, 41 Barb. 114; Sup'm. Ct. Sp. T. 1886, *Zadok v. Zadok*, Daily Reg. July 14, 1886.

⁶ Rule 73.

⁷ Code Civ. Proc. § 831.

⁸ Sup'm. Ct. 1886, *Bailey v. Bailey*, 41 Hun, 424.

⁹ Code Civ. Proc. § 831.

¹⁰ Sup'm. Ct. Sp. T. 1883, *Hall v. Hall*, 5 Law Bul. 91.

¹¹ Rules 30, 77.

¹² Rule 30; N. Y. Super. 1877, *Sullivan v. Sullivan*, 41 Super. 519; 52 How. 453; Sup'm. Ct. Sp. T. 1873, *Blott v. Rider*, 47 How. 90.

¹³ Chancery, 1831, *Murdock v. Murdock*, 1 Edw. Ch. 14; N. Y. Super. Sp. T. 1862, *Anonymous*, 17 Abb. 48; 1877, *Pollock v. Pollock*, 71 N. Y. 137.

¹⁴ 1877, *Pollock v. Pollock*, 71 N. Y. 137; 1880, *Conger v. Conger*, 82 N. Y. 603.

¹⁵ 1877, *Pollock v. Pollock*, 71 N. Y. 137; 1880, *Conger v. Conger*, 82 N. Y. 603; Com. Pl. Sp. T. 1882, *Donelly v. Donelly*, 63 How. 481.

prior to the date set forth is admissible.¹ The evidence to establish the adultery of plaintiff must be as conclusive as that against a defendant;² but the rule in criminal cases, that the proof must satisfy the mind beyond a reasonable doubt, does not apply to divorce cases.³ Where recriminatory charges are made, a finding "guilty as charged in the answer" is insufficient;⁴ but the uncorroborated testimony of loose women is insufficient to establish guilt.⁵ The report must show there was no collusion between the parties.⁶ The referee is not bound to deliver or file his report until his fees are paid (see *ante*, p. 62). If the husband will not take up a report in his wife's favor, she may do so, and have the amount inserted in her alimony;⁷ or he may be ordered to pay the fees.⁸

§ 3. **Entering Judgment.**—The report and proceedings must be certified to the court, and judgment must be rendered by the court.⁹ A judgment entered *ex parte* on the report of the referee will be set aside.¹⁰ Exceptions to the report must be filed and served within eight days after notice of filing,¹¹ otherwise the report will become absolute, though defective on its face, but leave may be given to file them now for then.¹² After exceptions are filed and served, the cause may be brought to a hearing at any special term thereafter on notice by either party.¹³ Except in the city of New York, the motion for judgment must be made at a

¹ N. Y. Super. Sp. T. 1877. Anonymous, 3 Abb. N. C. 161; Sup'm. Ct. Cir. 1845, Lockyer v. Lockyer, 1 Edm. 107.

² 1877, Pollock v. Pollock, 71 N. Y. 137.

³ Sup'm. Ct. 1883, Allen v. Allen, 18 Week. Dig. 184.

⁴ 1877, Pollock v. Pollock, 71 N. Y. 137.

⁵ Com. Pl. 1874, Platt v. Platt; 5 Daly, 295; Chancery, 1844, Turney v. Turney, 4 Edw. 566; Chancery, 1839, Banta v. Banta, 3 Edw. 295.

⁶ Chancery, 1841, Hanks v. Hanks, 3 Edw. Ch. 469.

⁷ Sup'm. Ct. Chamb. 1875. Heatherton v. Heatherton, 1 Week. Dig. 27.

⁸ 1872, Schloemer 3. Schloemer, 49 N. Y. 82.

⁹ Code Civ Proc. § 1229.

¹⁰ Sup'm. Ct. Sp. T. 1873, Blott v. Rider, 47 How. 90.

¹¹ Rules 30, 77.

¹² Sup'm. Ct. Sp. T. 1884, Gade v. Gade, 14 Abb. N. C. 510; Sup'm. Ct. 1874, Catlin v. Catlin, 2 Hun, 378.

¹³ Rule 30.

special term.¹ The only authority of the courts to grant a divorce is derived from the statute, and this must be strictly followed.² The action is sometimes said to be triangular, the third party being the public, whose interest is paramount, and must be carefully guarded.³ The special term cannot review the evidence and give such judgment as it thinks proper. If for any reason the proceedings do not warrant the entry of judgment, the motion to confirm the report must be denied,⁴ or the case may be sent back for further proof.⁵ A report that does not contain findings on all the material facts cannot be confirmed;⁶ but an allegation in a verified complaint that the adultery was committed without the consent, connivance, privity, or procurement of the plaintiff, that five years have not elapsed since the discovery thereof, and that since such discovery the parties have not cohabited will, unless denied, sustain a finding to such effect.⁷ If, for any reason, the proceedings before the referee do not warrant a decree, the motion for judgment will be denied;⁸ or if the proceedings disclose a suspicion of collusion,⁹ or if the complaint alleges adultery

¹ Code, § 770; Com. Pl. 1880, *Robertson v. Robertson*, 9 Daly, 44; Sup'm. Ct. Sp. T. 1882, *Smith v. Smith*, 4 Law Bul. 57.

² Chancery, 1825, *Burtis v. Burtis*, Hopk. 557; Chancery, 1828, *Palmer v. Palmer*, 1 Paige, 276; Chancery, 1831, *Perry v. Perry*, 2 Paige, 501; Sup'm. Ct. 1866, *Peugnet v. Phelps*, 48 Barb. 566; Sup'm. Ct. 1862, *Griffin v. Griffin*, 23 How. 183; but see *Wightman v. Wightman*, 4 J. Ch. 343; *Ferlat v. Gojou*, Hopk. 478.

³ N. Y. Super. 1877, *Sullivan v. Sullivan*, 41 Super. 519; N. Y. Super. 1877, *Harding v. Harding*, 43 Super. 27; Sup'm. Ct. Sp. T. 1873, *Blott v. Rider*, 47 How. 90. Sup'm. Ct. 1861, *Griffin v. Griffin*, 23 How. 183.

⁴ N. Y. Super. Sp. T. 1877, *Anonymous*, 3 Abb. N. C. 161; Sup'm Ct. 1878, *Meyer v. Meyer*, 7 Week. Dig.

535; Sup'm. Ct. 1880, *Schroeter v. Schroeter*, 23 Hun, 230.

⁵ Sup'm. Ct. Sp. T. 1886, *Zadok v. Zadok*, Daily Reg. July 14, 1886; N. Y. Super. 1877, *Harding v. Harding*, 43 Super. 27.

⁶ Sup'm. Ct. Sp. T. 1853, *Arborgast v. Arborgast*, 8 How. 297; Sup'm. Ct. 1871, *Price v. Price*, 9 Abb. N. S. 291; Sup'm. Ct. 1861, *Linden v. Linden*, 36 Barb. 61; Sup'm. Ct. 1863, *Myers v. Myers*, 41 Barb. 114.

⁷ Sup'm. Ct. Sp. T. 1881, *Farace v. Farace*, 61 How. 61; Sup'm. Ct. Sp. T. 1853, *Arborgast v. Arborgast*, 8 How. 297; but see *Zadok v. Zadok*, Daily Reg. July 14, 1886.

⁸ Sup'm. Ct. Sp. T. 1884, *Bloodgood v. Bloodgood*, Daily Reg. April 30, 1884.

⁹ Chancery, 1815, *Williamson v. Williamson*, 1 J. Ch. 488.

with E. M. and none other, and the referee reports it was committed with one whose name is unknown,¹ or where the referee finds it was committed with numerous persons none of whom are named in the complaint,² or where the only evidence is that of a physician, of facts learned during his professional employment; but in such case the report may be sent back for further proofs.³ It will be confirmed where the defendant was sane when the adultery was committed, but insane when the action was brought,⁴ or when based on unsupported confessions of a party made under circumstances which entirely preclude suspicions of collusion.⁵ Testimony of plaintiff that no other action for divorce had ever been begun, and no decree entered against him will sustain a finding on those points;⁶ but a finding against a fact merely because a date is wrongly given, cannot be sustained.⁷ The remedy of the defeated party is by appeal from the judgment entered on the report,⁸ or by motion for further relief;⁹ or where the testimony is insufficient by motion to send the case back to the referee for further evidence,¹⁰ as where the finding rests upon the unconfirmed evidence of the defendant,¹¹ or upon the uncorroborated evidence of a paramour,¹² or where there is reason to suspect condonation though not pleaded,¹³ but not when the proceedings show there is an insurmountable obstacle to a

¹ Chancery, 1840, *Bokel v. Bokel*, 3 Edw. Ch. 376.

² Chancery, 1840, *Kane v. Kane*, 3 Edw. Ch. 389.

³ Chancery, 1841. *Hanford v. Hanford*, 3 Edw. Ch. 468.

⁴ Sup'm. Ct. Sp. T. 1870, *Rathbun v. Rathbun*, 40 How. 328.

⁵ Sup'm. Ct. 1861, *Lyon v. Lyon*, 62 Barb. 168.

⁶ Sup'm. Ct. Sp. T. 1883, *Hall v. Hall*, 5 Law Bul. 91.

⁷ N. Y. Super. 1864, *Zorkowski v. Zorkowski*, 26 Super. 613; 27 How. 37.

⁸ N. Y. Super. Sp. T. 1877, Anonymous, 3 Abb. N. C. 161; Sup'm. Ct.

1880, *Schroeter v. Schroeter*, 23 Hun, 230.

⁹ N. Y. Super. Sp. T. 1877, Anonymous, 3 Abb. N. C. 161; Sup'm. Ct. 1880, *Schroeter v. Schroeter*, 23 Hun, 230.

¹⁰ N. Y. Super. Sp. T. 1864, *Zorkowski v. Zorkowski*, 26 Super. 613; 27 How. 37; N. Y. Super. Sp. T. 1873, *Hamburger v. Hamburger*, 46 How. 346.

¹¹ Sup'm. Ct. Sp. T. 1853, *Arborgast v. Arborgast*, 8 How. 297; but see *Lyon v. Lyon*, 62 Barb. 168.

¹² N. Y. Super. 1866, Anonymous, 28 Super. 611.

¹³ Chancery, 1834, *Smith v. Smith*, 4 Paige, 432.

decree.¹ The adultery of the husband connived at by the wife is not a bar to his action for her adultery not connived at or condoned by him.² Where exceptions are filed and defendants motion thereon was to set aside the report and for further relief, it is virtually for a new trial, and the report may be set aside and a new trial granted.³ In such case the order of reference should be set aside and a new trial of the issues ordered.⁴ Only a party, or the attorney or counsel of a party who has appeared, can have access to the pleadings or proceedings without special permission of the court.⁵

§ 4. **Reference on Default in Actions for Divorce for Adultery.**—A judgment for divorce cannot be granted of course on default of defendant;⁶ as a matter of public policy strict proof of due service must be made.⁷ The moving papers are the same as on a motion for a reference of the issues in divorce cases.⁸ The application will be refused unless the name of the party with whom, or the place where the offense was committed appears in the complaint.⁹ The referee must be selected and appointed by the court;¹⁰ the order must be to hear and report;¹¹ the referee must be sworn,¹² and should in writing appoint a time and place of hearing;¹³ witnesses may be subpoenaed to appear and testify and produce documents, books, or papers;¹⁴ refusal to appear, to testify, or to produce books or papers may be punished as for contempt;¹⁵ for proceedings to punish for

¹ Chancery, 1848, *Montgomery v. Montgomery*, 3 Barb. Ch. 132.

² Sup'm. Ct. 1882, *Bleck v. Bleck*, 27 Hun, 296.

³ N. Y. Super. 1877, *Harding v. Harding*, 43 Super. 27.

⁴ N. Y. Super. 1877, *Harding v. Harding*, 43 Super. 27; compare *Schroeter v. Schroeter*, 23 Hun, 230.

⁵ Rule 77.

⁶ Rule 77.

⁷ N. Y. Super. Sp. T. 1877, *Sullivan v. Sullivan*, 41 Super. 519; Sup'm. Ct. Sp. T. 1873, *Blott v. Rider*, 47 How. 90.

⁸ Rule 73.

⁹ N. Y. Super. 1852, *Heyde v. Heyde*, 7 Super. 692.

¹⁰ Code Civ. Proc. §§ 1012; Rule 73.

¹¹ N. Y. Super. Sp. T. 1877, *Sullivan v. Sullivan*, 41 Super. 519; N. Y. Super. Sp. T. 1871, *Merrill v. Merrill*, 11 Abb. N. S. 74.

¹² Code Civ. Proc. § 1016

¹³ Sup'm. Ct. Sp. T. 1853, *Stephens v. Strong*, 8 How. 339.

¹⁴ Code Civ. Proc. § 1017.

¹⁵ Code Civ. Proc. § 8.

contempt on interlocutory references, see page 87. All the material allegations of the complaint must be satisfactorily proven, and in addition thereto by the testimony of the plaintiff, or otherwise, that there is no judgment or decree in any court of the state of competent jurisdiction against him in favor of defendant for divorce for adultery.¹ Testimony of plaintiff that no action for divorce had ever been begun, and no decree entered against him will sustain a finding on those points.² Plaintiff must be examined on oath as to whether the alleged adultery was committed without the consent, connivance, privity, or procurement of plaintiff; whether five years have elapsed since the discovery thereof; whether there has been voluntary cohabitation since such discovery, and whether five years have elapsed since such discovery;³ although this has been held unnecessary where these allegations were made in a verified complaint.⁴ Testimony as to the legitimacy of children can be taken only where the issue is distinctly raised by the complaint.⁵ Evidence not pertinent to the issues should be rejected.⁶ Testimony of witnesses must be signed by them and filed with the report.⁷ The report must contain findings as to all the material facts required to be proven,⁸ including the place of marriage or residence of the parties.⁹ If defective in these particulars it may be sent back for further proof.¹⁰ The opinion of the referee is not binding on the court.¹¹ Judgment can be rendered only by special direction of the court.¹² Defendant in de-

¹ Code Civ. Proc. § 1757; N. Y. Super. Sp. T. 1864, *Zorkowski v. Zorkowski*, 26 Super. 613; 27 How. 37.

² Sup'm. Ct. Sp. T. 1883, *Hall v. Hall*, 3 Law Bul. 91.

³ Rule 73; Sup'm. Ct. Sp. T. 1886, *Zadok v. Zadok*, Daily Reg. July 14, 1886.

⁴ Sup'm. Ct. Sp. T. 1853, *Arborgast v. Arborgast*, 8 How. 297; Sup'm. Ct. Sp. T. 1881, *Farace v. Farace*, 61 How. 61.

⁵ Rule 76.

⁶ Sup'm. Ct. Sp. T. 1879, *Ager v. Ager*, 1 Law Bul. 20.

⁷ Rule 30.

⁸ Rule 73.

⁹ Chancery, 1842, *McNeil v. McNeil*, 3 Edw. Ch. 550.

¹⁰ Chancery, 1840, *Dobbs v. Dobbs*, 3 Edw. Ch. 377; Chancery, 1839, *Dodge v. Dodge*, 7 Paige, 589; Chancery, 1842, *Pugsley v. Pugsley*, 9 Paige, 589; Sup'm. Ct. Sp. T. 1886, *Zadok v. Zadok*, Daily Reg. July 14, 1886.

¹¹ Sup'm. Ct. 1882, *Moore v. Moore*, 14 Week. Dig. 255.

¹² Rule 77.

fault may appear, and cross-examine witnesses in aid of the conscience of the court.¹

§ 5. **Reference as to Alimony and Counsel Fees before Decree.**—A reference to ascertain what will be a suitable sum to be allowed to the wife to enable her to carry on or defend the action, or to provide suitably for the education and maintenance of the children of the marriage, or for the support of the wife, may be made from time to time during the pendency of the action,² or in an action for divorce for adultery, or for a separation, in the judgment dissolving the marriage, or decreeing the separation.³ Where the action is for dissolution of the marriage on the ground of impotence, fraud, force, or duress, or that one of the parties was insane, or an idiot, or lunatic, the reference to ascertain what is a suitable provision for the maintenance may be ordered in the judgment dissolving the marriage.⁴ No allowance to the wife can be made after final judgment, unless provided for in the decree,⁵ but on the petition of the wife, to whom in an action for divorce the custody of the children has been awarded, an allowance may be made for the care and education of her children, although no provision therefor was made in the decree.⁶ Where the wife is plaintiff the motion for temporary alimony may be made before the complaint is served,⁷ but in such case the moving papers must set forth in substance all the facts necessary to make a good complaint in the action.⁸ Where the application is made before judgment it must appear by the moving papers that the wife has a good cause of action or defense; that it is brought or defended in good faith, and that the applicant has not sufficient means of her own wherewith to carry on the suit, and to

¹ Chancery, 1847, *Perry v. Perry*,
² Barb. Ch. 285.

² Code Civ. Proc. § 1769.

³ Code Civ. Proc. §§ 1759, 1766.

⁴ Code Civ. Proc. § 1751.

⁵ 1874, *Kamp v. Kamp*, 59 N. Y.
212; 1884, *Erkenbrach v. Erken-*

brach, 96 N. Y. 456; 1878, *Davis v.*
Davis, 75 N. Y. 221.

⁶ 1884, *Erkenbrach v. Erkenbrach*,
96 N. Y. 456.

⁷ Sup'm. Ct. Sp. T. 1861, *Whitney*
v. Whitney, 22 How. 175.

⁸ Sup'm. Ct. Sp. T. 1861, *Whitney*
v. Whitney, 22 How. 175.

support herself in the meantime.¹ A marriage *prima facie* valid must be shown,² but a ceremonial marriage is not essential.³ Where the wife is defendant the answer should form part of the moving papers.⁴ The application may be resisted by papers tending to show that the wife has no cause of action or defense,⁵ that she has sufficient means of her own,⁶ that the husband has already made provision for her,⁷ that she is residing with her father who is supporting her under a contract with her husband,⁸ or that her habits are such that she cannot be entrusted with money.⁹ The application must be made at special term on notice.¹⁰ The granting or refusing of a reference is discretionary.¹¹ If a reference is directed the order should be to inquire and report the income of the husband's property,

¹ Sup'm. Ct. Sp. T. 1861, *Whitney v. Whitney*, 22 How. 175; *Chancery*, 1841, *Bartlett v. Bartlett*, *Clarke Ch.* 460; *Chancery*, 1847, *Jones v. Jones*, 2 Barb. Ch. 146; Sup'm. Ct. Sp. T. 1847, *Hollerman v. Hollerman*, 1 Barb. 64; Sup'm. Ct. Sp. T. 1847, *Bissell v. Bissell*, 1 Barb. 430; N. Y. Super. Sp. T. *Solomon v. Solomon*, 28 How. 218.

² 1872, *Brinkley v. Brinkley*, 50 N. Y. 184; 1877, *Collins v. Collins*, 71 N. Y. 269; again, 80 N. Y. 1; Com. Pl. 1878, *Kinzey v. Kinzey*, 7 Daly, 460; Sup'm. C. Sp. T. 1874, *Humphreys v. Humphreys*, 49 How. 140.

³ 1872, *Brinkley v. Brinkley*, 50 N. Y. 184; 1880, *Collins v. Collins*, 80 N. Y. 1; Sup'm. Ct. Sp. T. 1867, *Herforth v. Herforth*, 2 Abb. N. S. 483.

⁴ *Chancery*, 1818, *Lewis v. Lewis*, 3 J. Ch. 519; Sup'm. Ct. Sp. T. 1872, *Miller v. Miller*, 43 How. 125; N. Y. Super. Sp. T. 1866, *Strong v. Strong*, 1 Abb. N. S. 358.

⁵ Sup'm. Ct. Sp. T. 1872, *Douglas v. Douglas*, 13 Abb. N. S. 291; Sup'm. Ct. Sp. T. 1864, *Kock v. Kock*, 42

Barb. 515; Sup'm. Ct. 1861, *Griffin v. Griffin*, 23 How. 189; Sup'm. Ct. Sp. T. 1857, *Fowler v. Fowler*, 4 Abb. 411; Sup'm. Ct. Sp. T. 1847, *Hollerman v. Hollerman*, 1 Barb. 65; Sup'm. Ct. 1868, *Appleton v. Warner*, 51 Barb. 270; 1880, *Collins v. Collins*, 80 N. Y. 1; Sup'm. Ct. 1883, *Desbrough v. Desbrough*, 29 Hun, 592; 1877, *Collins v. Collins*, 71 N. Y. 269.

⁶ Sup'm. Ct. Sp. T. 1872, *Douglas v. Douglas*, 13 Abb. N. S. 291; Sup'm. Ct. Sp. T. 1848, *Snyder v. Snyder*, 3 Barb. 621; *Chancery*, 1847, *Jones v. Jones*, 2 Barb. Ch. 146; 1880, *Collins v. Collins*, 80 N. Y. 1.

⁷ *Chancery*, 1844, *Rose v. Rose*, 11 Paige, 166; *Chancery*, 1831, *Osgood v. Osgood*, 2 Paige, 621; 1880, *Collins v. Collins*, 80 N. Y. 1.

⁸ *Chancery*, 1841, *Bartlett v. Bartlett*, *Clarke*, 460; Sup'm. Ct. 1883, *Desbrough v. Desbrough*, 29 Hun, 512.

⁹ *Chancery*, 1835, *Saunders v. Saunders*, 2 Edw. Ch. 491.

¹⁰ Rule 37.

¹¹ Code Civ. Proc. § 1015.

what would be a reasonable sum to be allowed to the wife for counsel fees, support and maintenance during the pendency of the action, and that upon the coming in and confirmation of the report the husband should pay the amount of such alimony and allowance at the times and in the manner specified in such report.¹ Where the reference is made in the wife's action the order may direct the referee to inquire into the property of each party.² The proceedings to the hearing are the same as in other interlocutory references. Evidence of the wife's misconduct is admissible to aid in fixing the amount.³ The question of marriage should not be tried where that is the principal issue in the action.⁴ The husband's ability to pay may be considered,⁵ and the position of the parties in society.⁶ Where the wife, defendant, denies the charges under oath, the husband's poverty is no reason for refusing her an allowance.⁷ An agreement between the parties as to the amount to be allowed is not conclusive; a reference may be had to ascertain if the agreement is fair and equitable.⁸ Where counsel fees are asked for, proof of the amount and value of labor required in the cause may be given.⁹ The income of the husband as well as his property is a proper subject of inquiry.¹⁰ The testimony of the witnesses must be signed by them and annexed by the referee to his report.¹¹ The form of the report and the proceedings thereon are the same as in other references to inquire and report. The

¹ Chancery, 1847, *Gerard v. Gerard*, 2 Barb. Ch. 73; Chancery, 1832, *Lawrence v. Lawrence*, 3 Paige, 267.

² 1880, *Collins v. Collins*, 80 N. Y. 1.

³ Sup'm. Ct. Sp. T. 1859, *Fowler v. Fowler*, 4 Abb. 411.

⁴ Sup'm. Ct. Sp. T. 1867, *Herforth v. Herforth*, 2 Abb. N. S. 483.

⁵ Chancery, 1832, *Lawrence v. Lawrence*, 3 Paige, 267; Com. Pl. 1869, *Leslie v. Leslie*, 6 Abb. N. S. 193; aff'd Ct. App. 10 Abb. N. S. 69.

⁶ Com. Pl. 1869, *Leslie v. Leslie*, 6 Abb. N. S. 193; 10 Abb. N. S. 69; Chancery, 1832; *Lawrence v. Lawrence*, 3 Paige, 267.

⁷ Chancery, 1838, *Purcell v. Purcell*, 3 Edw. Ch. 194; Sup'm. Ct. Sp. T. 1849, *Hallock v. Hallock*, 4 How. 160.

⁸ Chancery, 1835, *Daggett v. Daggett*, 5 Paige, 509.

⁹ 1875, *De Llamosas v. De Llamosas*, 62 N. Y. 618.

¹⁰ Sup'm. Ct. Chamb. 1883, *Tearle v. Tearle*, Daily Reg. July 25, 1883,

¹¹ Rule 30.

referee is not bound to file his report until his fees are paid. *Ante*, p. 90. The court may order the husband to pay to the wife a fixed sum to enable her to take up a report in her favor.¹ The report is not conclusive on the court; it may be sent back for further evidence.²

§ 6. **Reference as to Alimony after Decree.**—Where the wife is successful the court, in making the decree, may order a reference to ascertain what would be a reasonable sum to be allowed the wife to enable her to provide suitably for the education and maintenance of the children of the marriage and the support of the wife.³ The general term may order such reference when omitted in the court below.⁴ The form of the order and the proceedings thereon are the same as on a reference for temporary alimony, p. 196, *ante*. The conduct of the parties may be shown to affect the amount;⁵ the situation of the wife, and the ability of the husband to pay,⁶ and all other matters that would be proper on a reference as to temporary alimony, but the amount allowed should be larger;⁷ marriage of the wife does not affect the decree.⁸ The report and the proceedings thereon are the same as in other references to inquire and report, pp. 88, 89. On proceedings by the wife to enforce payment of alimony awarded by the judgment, the husband cannot be compelled to pay the fees of the referee.⁹ Where the judgment fixes alimony with leave to apply for a change in the amount from time to time as the circumstances of

¹ 1872, *Schloemer v. Schloemer*, 49 N. Y. 82.

² *Sup'm. Ct.* 1871, *Gallinger v. Gallinger*, 4 *Lans.* 475; 61 *Barb.* 31.

³ *Code Civ. Proc.* § 1759; *Chancery*, 1845, *Coolidge v. Coolidge*, 1 *Barb. Ch.* 77; 1862, *Forrest v. Forrest*, 25 N. Y. 501; *Chancery*, 1835, *Daggett v. Daggett*, 5 *Paige*, 509.

⁴ 1862, *Forrest v. Forrest*, 25 N. Y. 501; *Sup'm. Ct.* 1871, *Gallinger v. Gallinger*, 4 *Lans.* 473; 61 *Barb.* 31.

⁵ *Chancery*, 1828, *Peckford v. Peckford*, 1 *Paige*, 274; *Chancery*, 1815,

Bedell v. Bedell, 1 *Johns. Ch.* 604.

⁶ *Sup'm. Ct.* 1879, *Park v. Park*, 18 *Hun*, 466.

⁷ *Chancery*, 1832, *Lawrence v. Lawrence*, 3 *Paige*, 267; *Com. Pl.* 1869, *Leslie v. Leslie*, 6 *Abb. N. S.* 193; *aff'd Ct. App.*; 10 *Abb. N. S.* 64, *N. Y. Super. Sp. T.* 1864, *Simmons v. Simmons*, 25 *Super.* 712.

⁸ *Sup'm. Ct.* 1874, *Shepherd v. Shepherd*, 1 *Hun*, 240; 58 *N. Y.* 644.

⁹ *Com. Pl. Sp. T.* 1881, *McQuien v. McQuien*, 61 *How.* 280.

the parties are altered, a reference to ascertain the amount may be had after judgment.¹ A referee who, in an action for divorce, found against one of the parties, cannot be appointed on *habeas corpus* proceedings as to the custody of a child of the marriage.²

§ 7. **References in Actions for Separation.**—Actions for separation are referred in the same manner as actions for divorce for adultery, the mode of procedure is the same, and judgment is entered in the same manner. See pp. 186, 188, *ante*. Where the wife prevails in her suit and is without means, the husband may be compelled to pay the fees of the referee.³ The court can give only such judgment as is authorized by statute.⁴ If on the trial plaintiff does not make out a case for separation, the complaint must be dismissed.⁵ Affirmative relief may be granted to defendant.⁶ To authorize a judgment of separation it must appear that there was actual violence, or reasonable apprehension of bodily injury;⁷ but where the husband is plaintiff a single act is not enough, so long as there are grounds for believing he can protect himself by a reasonable exercise of his marital rights.⁸ Mental suffering, without apprehension of personal injury, are not enough;⁹ nor an austerity of manner, severe language, and occasional outbursts of temper;¹⁰ nor angrily expelling wife on suspicion of unfaithfulness;¹¹ nor in refusing to allow plaintiff to attend the church to

¹ Com. Pl. 1883, *Middleberger v. Middleberger*, 12 Daly, 195.

² Sup'm. Ct. 1886, *Matter of Bliss*, 39 Hun, 594.

³ Com. Pl. Sp. T. 1885, *Early v. Early*, 2 How. N. S. 239.

⁴ 1878, *Davis v. Davis*, 75 N. Y. 221.

⁵ 1878, *Davis v. Davis*, 75 N. Y. 221; Buff. Super. 1865, *Palmer v. Palmer*, 29 How. 390.

⁶ Code Civ. Proc. § 1765; Com. Pl. Sp. T. 1859, *McNamara v. McNamara*, 2 Hilt. 547; 9 Abb. 18.

⁷ Sup'm. Ct. Sp. T. 1880, *Ruckman v. Ruckman*, 58 How. 278;

Sup'm. Ct. 1848, *Whispell v. Whispell*, 4 Barb. 217; Chancery, 1831, *Perry v. Perry*, 2 Paige, 501; Sup'm. Ct. Sp. T. 1869, *Davis v. Davis*, 37 How. 42.

⁸ Chancery, 1846, *Perry v. Perry*, 1 Barb. Ch. 516.

⁹ N. Y. Super. Sp. T. 1879, *Paisley v. Paisley*, 2 Law Bul. 6.

¹⁰ N. Y. Super. Sp. T. 1863, *Solomon v. Solomon*, 28 How. 218; Chancery, 1831, *Mason v. Mason*, 1 Edw. Ch. 278.

¹¹ Sup'm. Ct. 1863, *Barlow v. Barlow*, 2 Abb. N. S. 259.

which she belongs;¹ nor conduct tending to provoke disgust and annoyance;² nor refusal to allow a wife to name a child;³ nor unkindness, fits of passion, violent language, ungentlemanly conduct.⁴ But the injury need not be to the person. Unmercifully beating her child in her presence is cruelty;⁵ so are spitting on a wife, or groundless and malicious charges against her chastity;⁶ so are words of menace accompanied by a probability of bodily violence.⁷ Misconduct of plaintiff is a defense,⁸ and misconduct includes adultery.⁹ A finding of abandonment must be accompanied by a refusal to support,¹⁰ and this must be founded on evidence of fixed and determined purpose on the part of the husband to withdraw from the wife.¹¹ Subsequent acts will revive condoned cruelty.¹² If the plaintiff is not within the provisions of the code as to residence, the motion for judgment will be denied.¹³ A reference on default in actions for separation is obtained in the same manner, and the proceedings thereon are the same as in actions for divorce for adultery. See p. 186, *ante*.

§ 8. References in Matrimonial Actions other than for a Divorce for Adultery or for a Separation.—A reference of the issues in an action to annul a marriage can be ordered only by consent of the parties, and to a referee designated only by the court;¹⁴ one to whom all the parties object may be appoint-

¹ Chancery, 1832, *Lawrence v. Lawrence*, 3 Paige, 267.

² Sup'm. Ct. Sp. T. 1863, *Conklin v. Conklin*, 17 Abb. 20 n.

³ Sup'm. Ct. Sp. T. 1883, *Appleby v. Appleby*, 2 Civ. Proc. 422.

⁴ Sup'm. Ct. Sp. T. 1884, *De Meli v. De Meli*, 67 How. 20.

⁵ Sup'm. Ct. 1863, *Bihin v. Bihin*, 17 Abb. 19.

⁶ Sup'm. Ct. 1848, *Whispell v. Whispell*, 4 Barb. 217; 1878, *Kennedy v. Kennedy*, 73 N. Y. 369.

⁷ Sup'm. Ct. 1848, *Whispell v. Whispell*, 4 Barb. 217.

⁸ Code Civ. Proc. § 1765.

⁹ Sup'm. Ct. Sp. T. 1883, *Spahn v. Spahn*, 12 Abb. N. C. 169; Sup'm. Ct. 1880, *Doe v. Roe*, 23 Hun, 19.

¹⁰ Sup'm. Ct. 1868, *Atwater v. Atwater*, 53 Barb. 621.

¹¹ Sup'm. Ct. Sp. T. 1880, *Ruckman v. Ruckman*, 58 How. 278.

¹² Chancery, 1842, *Burr v. Burr*, 10 Paige, 20; Sup'm. Ct. 1848, *Whispell v. Whispell*, 4 Barb. 217.

¹³ Sup'm. Ct. 1882, *Ramsden v. Ramsden*, 28 Hun, 285.

¹⁴ Code Civ. Proc. § 1012; Rule 73.

ed.¹ If the application is on the ground that plaintiff was under the age of legal consent, it must be shown by affidavit that the parties have not freely cohabited as husband and wife; if on the ground that consent was obtained by fraud, that there has been no voluntary cohabitation; if on the ground that plaintiff was a lunatic, that the lunacy still continues, that the parties have not cohabited since plaintiff was restored to his reason, and on the reference plaintiff must be examined as to these facts.² Where impotence is the basis of the action, that it still exists and is incurable,³ but the action must be brought within two years after the marriage.⁴ In none of this class of cases can judgment be rendered by default for want of appearance or pleading, or, on the trial of an issue, without proof of the facts on which the allegations are founded. Declarations or confessions are insufficient.⁵ Where impotence is the ground of the action the court may order a physical examination of the defendant;⁶ but where the wife is defendant a second examination will not be ordered where one has been had by competent surgeons.⁷ If the examination shows that the incapacity is curable, a divorce cannot be decreed, although defendant refuses to submit to an operation to effect a cure.⁸ Misrepresentations as to character and property are not grounds for divorce,⁹ but fraudulent representations as to health are.¹⁰ In the absence of positive concealment the man's ignorance of the woman's pregnancy at the time of marriage is not ground of nullity.¹¹

¹ Code Civ. Proc. § 1024.

² Rule 74.

³ Code Civ. Proc. § 1743.

⁴ Code Civ. Proc. § 1752; Sup'm. Ct. 1861, *Griffin v. Griffin*, 23 How. 183; compare *Kaiser v. Kaiser*, 16 Hun, 602.

⁵ Code Civ. Proc. § 1753.

⁶ *Chancery*, 1836, *Devenbagh v. Devenbagh*, 5 Paige, 554; *Chancery*, 1841, *Newell v. Newell*, 9 Paige, 25.

⁷ *Chancery*, 1836, *Devenbagh v. Devenbagh*, 5 Paige, 554; but see *Newell v. Newell*, 9 Paige, 35.

⁸ *Chancery*, 1836, *Devenbagh v. Devenbagh*, 6 Paige, 175.

⁹ Sup'm. Ct. Sp. T. 1876, *Klein v. Wolfsohn*, 1 Abb. N. C. 134.

¹⁰ Sup'm. Ct. 1875, *Meyer v. Meyer*, 49 How. 311.

¹¹ N. Y. Super. 1883, *Barth v. Barth*, 5 Law. Bul. 87.

FORMS.

No. 1.

CAPTION OF AN ORDER OF COURT IN AN ACTION.

At a special term of the
court held at the
court-house in the of
on the day of A. D.
18 .

Present.—Hon. , Justice.

Title of the cause. }

On reading and filing, &c.

No. 2.

CAPTION OF A CHAMBER ORDER IN AN ACTION.

Title of the Cause. }

On the annexed affidavit (*or it appearing to my satisfaction from*), it is ordered, &c.

No. 3.

CAPTION OF AN ORDER OF COURT IN SPECIAL PROCEEDINGS.

At a special term of the
 court held at the
 court-house in the of
 on the day of A. D.
 18 .

Present.—Hon. , Justice.

In the Matter of the appli- }
 cation of }

On reading and filing, &c.

No. 4.

CAPTION OF A CHAMBER ORDER IN SPECIAL PROCEEDINGS.

In the Matter of }

On the annexed affidavit (*or it appearing to my satisfaction from*), ordered, &c.

No. 5.

CAPTION OF AN AFFIDAVIT.

Title of the Cause or Pro- }
 ceeding. }

County of , ss.
 sworn, deposes and says, &c.

A. B., being duly

No. 6.

CAPTION OF NOTICE OF MOTION.

Title of the Cause.

}

Sir :

You will please take notice, &c.

No. 7.

CONSENT TO REFER IN OTHER THAN MATRIMONIAL
ACTIONS.

Title of the Cause.

}

We hereby consent that the above entitled action, and all the issues therein be referred to (*name of referee, if agreed upon*) to hear and determine the same, and that either party may enter and order to that effect.

(*If the parties desire to name another referee in case the one selected refuses to serve, or in case a new trial is granted, add*)

This stipulation is made upon the express condition that should the said _____ refuse to serve, or should a new trial of this action be granted, the parties hereto shall have the right to name the new referee.

Date.

, Plaintiff's Attorney.

, Defendant's Attorney.

No. 8.

ORDER OF REFERENCE BY CONSENT.

Caption as in form No. 1. }

On reading and filing the consent of the parties hereto,
and on motion of _____ attorney for the (*plaintiff*
or defendant),

It is ordered that the above entitled action, and all the
issues therein be referred to _____, Esq., counsellor
at law, to hear and determine the same.

No. 9.

NOTICE OF TIME AND PLACE OF HEARING BY REFEREE.

Title of the Cause. }

By virtue of an order in the above entitled action bearing
date the _____ day of _____ A. D. 18 __, I
the referee appointed therein do hereby appoint
the _____ day of _____ A. D. 18 __, at _____ o'clock in the
_____ noon, at my office, No. __, _____ street, in the city of
_____, as the time and place of the first hearing in
said action.

Date.

Signature.

Address.

No. 10.

NOTICE OF TRIAL BEFORE REFEREE.

Title of the Cause.

}

Sir:

You will please take notice that the above action will be brought to trial (*if served by plaintiff insert and an inquest taken therein, if by defendant and a motion made to dismiss the complaint*), before the referee therein at his office No. , street, in the of on the day of , A. D. , at o'clock in the noon of that day.

Date.

Signature.

Address.

No. 11.

AFFIDAVIT BY PARTY TO MOVE FOR COMPULSORY REFERENCE.

Caption as in form No. 5.

}

A. B., the (*plaintiff or defendant*) in this action, being duly sworn, deposes and says:

I. This action is brought to recover (*here state nature of action*).

II. That the action is at issue as to all parties, and is number on the calendar of this court.

III. That the answer is (*here state nature of defense*).

IV. That the trial of this action will, as this deponent is advised and believes, involve the examination of a long

account on the part of the (*plaintiff, or defendant, or both*) consisting of at least items of charges and credits, and will not require the decision of difficult questions of law.

Jurat.

(Signature.)

No. 12.

AFFIDAVIT BY ATTORNEY TO MOVE FOR COMPULSORY
REFERENCE.

Caption as in form No. 5. }

, attorney for the (*plaintiff or defendant*) herein, being duly sworn, deposes and says :

I. This is an action for (*here state nature of action*) as appears by the complaint herein, of which a copy is hereto annexed, marked —

II. That the answer is (*here state nature of answer*) as appears by a copy thereof hereto annexed marked —

III. That the cause is at issue as to all parties and ready for trial, and is No. on the calendar of this court.

IV. That to maintain the issues made by the pleadings it will be necessary for the (*plaintiff, defendant, or both*) to prove an account consisting of at least items of charges and credits, and the trial will not involve the decision of difficult questions of law.

V. That the reason this affidavit is not made by (*plaintiff or defendant*) is (*state reasons*).

Jurat.

Signature.

No. 13.

NOTICE OF MOTION FOR REFERENCE OF ISSUES.

Caption as in form No. 6. }

You will please take notice that upon the affidavit, of which a copy is hereto annexed (*if other papers are to be read name them*), or (*and on all the pleadings and proceedings in this cause*) a motion will be made at special term of this court to be held at on the day of A. D. , at o'clock in the noon, or as soon thereafter as counsel can be heard, for an order referring this cause and all the issues to a referee to hear and determine.

Yours, etc.

Date.

Address.

Attorney for.

No. 14.

AFFIDAVIT TO OPPOSE MOTION WHERE WAS A SPECIAL AGREEMENT TO PERFORM THE LABOR OR RENDER THE SERVICES FOR A GROSS SUM.

Caption as in form No. 5. }

A. B., the (*plaintiff or defendant*), being duly sworn, deposes and says :

I. That the trial of this action will not involve the examination of a long account within the provisions of section 1013 of the code of civil procedure.

II. That the action is for work, labor, and services, all which defendant agreed to perform for the sum of dollars, and there are no other items of debit or credit involved herein.

No. 15.

AFFIDAVIT TO OPPOSE MOTION FOR REFERENCE BY
DENYING ACCOUNT.

Caption as in form No. 5. }

A. B. (*plaintiff or defendant*), being duly sworn, deposes and says :

I. That the issue herein does not involve a long account within the provisions of section 1013 of the code of civil procedure.

II. That the action is for goods sold and delivered, that all said goods were sold at one time, that the credit thereon was a payment at said time and deducted from the amount of said bill, and there are no other items of debit or credit involved therein.

III (Set forth any other matter showing that the alleged account only involves numerous items of damage.)

Jurat.

Signature.

No. 16.

AFFIDAVIT TO OPPOSE MOTION WHERE THE ACTION IS NOT
FOUNDED ON CONTRACT.

Caption as in form No. 5. }

A. B., the defendant (*or plaintiff*) in this action, being duly sworn, deposes and says :

I. That this action does not belong to the class of referable actions within the meaning of section 1013 of the code of civil procedure.

II. That this action is not founded on contract, but is for unliquidated damages for breach of contract (*or for damages for negligence, or fraud, as the case may be*) as appears by the complaint herein, of which a copy is hereto annexed.

Jurat.

Signature.

No. 17.

AFFIDAVIT TO OPPOSE MOTION WHERE FRAUD IS SET UP AS A DEFENSE.

Caption as in form No. 5. }

A. B., plaintiff (*or defendant*) herein, being duly sworn, deposes and says :

I. That this action is for goods sold and delivered (*or other contract*).

II. That the answer contains allegations of fraud in procuring the sale (*or contract*) as appears by the answer herein, of which a copy is hereto annexed.

Jurat.

Signature.

No. 18.

AFFIDAVIT TO OPPOSE MOTION WHERE THE ACCOUNT IS ONLY COLLATERALLY INVOLVED.

Caption as in form No. 5. }

A. B., the plaintiff (*or defendant*), being duly sworn, deposes and says :

I. That this action is brought to recover (*state cause of action*).

II. That the answer is (*state contents of answer*).

III. That the real issue is (*state issue*), and no accounting can be had until such issue has been tried and determined.

Jurat.

Signature.

No. 19.

AFFIDAVIT TO OPPOSE MOTION ON THE GROUND THAT A SPEEDY TRIAL CAN BE HAD AT CIRCUIT.

Caption as in form No. 5. }

A. B., the plaintiff (*or defendant*), being duly sworn, deposes and says :

I. That this action is brought to recover (*state cause of action*), that the answer is (*state contents of answer*).

II. That no difficult questions of law are involved therein, that the cause can be tried at the (*next*) circuit in less than one day, and a reference, on account of the additional trouble and expense involved, would be oppressive to this deponent.

Jurat.

Signature.

No. 20.

AFFIDAVIT TO OPPOSE MOTION WHERE DIFFICULT QUESTIONS OF LAW ARE INVOLVED.

Caption as in form No. 5. }

A. B., the plaintiff (*or defendant*), being duly sworn, deposes and says :

I. That this action is brought to recover (*state cause or action*), and the defense is (*state nature of defense*).

II. That this deponent has fully and fairly stated the case in this action to C. D., his counsel, who resides at No. , street, in the of , and that the trial of

this action will involve the decision of a difficult question of law, as he is advised by his said counsel, after such statement made as aforesaid and verily believes.

III. On the trial of this cause deponent will insist (*here deponent's point of law*), which point, as deponent is advised, is material to the case, and defendant's counsel will say (*here state defendant's point of law*), and said points are difficult in their application to this case.

Jurat.

Signature.

No. 21.

STIPULATION TO DEFEAT REFERENCE.

Title of the Cause. }

Sir :

You will please take notice that if this case is tried before a jury and the jury or the court decide that defendant (*or plaintiff*) is liable for the goods sold (*or matters alleged*) he will not question the items of the account, but will admit that it is in all respects correct.

Yours, etc.

Date.

Address.

Attorney for.

No. 22.

STIPULATION NOMINATING REFEREE IF MOTION FOR
REFERENCE IS GRANTED.

Title of the Cause. }

It is hereby stipulated and agreed by and between the parties hereto that if the motion for a reference be granted
, Esq., shall be appointed referee herein.

Date.

, Att'y for Pl'ff.

, Att'y for Def't.

No. 23.

ORDER OF REFERENCE MADE ON CONTESTED MOTION.

Caption as in form No. 1. }

On reading and filing the affidavits of (*naming papers read*).

After hearing , Esq., of counsel for
in favor of said motion, and , Esq., of counsel
for in opposition thereto, on motion of
Esq., attorney for said (*plaintiff or defendant*), it is ordered
that the above entitled action, and all the issues therein, be
referred to , Esq., counsellor at law, to hear and
determine the same.

No. 24.

ORDER OF REFERENCE MADE AT CIRCUIT.

At a circuit (*or trial term*) of the
 court held at the
 court-house in the of
on the day of A. D. 18.

Present.—Hon. , Justice.

Title of the cause. }

This action coming on to be tried before (*and
a jury*), and it appearing to the satisfaction of the court
that the trial will involve the examination of a long ac-
count, it is ordered that this cause and all the issues therein
be referred to , Esq., counsellor at law, to hear
and determine the same.

No. 25.

STIPULATION TO REFER PURSUANT TO ORDER GRANTING
A FAVOR.

Title of the Cause.

$$\left. \begin{array}{l} \text{ } \end{array} \right\}$$

In conformity with an order made herein on the day
of A. D. 18 , *or in conformity with the terms of the*
foregoing order).

It is hereby stipulated on the part of the plaintiff (*or defendant*) to refer this action and all the issues thereon to _____, counsellor at law, to hear and determine the same. (*If the order contains other conditions stipulate to comply*).

Date.

Signature.

No. 26.

OATH OF REFEREE.

Title of the Cause.

$$\left. \begin{array}{l} \text{ } \\ \text{ } \end{array} \right\}$$

County of _____, ss.

I, _____, the referee duly appointed herein by an order bearing date the _____ day of _____ A. D. 18____, to (*state object of reference*) do solemnly swear that I will faithfully and fairly try the issues (*or determine the questions referred to me*) and make a just and true report thereon according to the best of my understanding.

Jurat.

Signature.

No. 27.

WAIVER OF OATH OF REFEREE.

Title of the cause.

}

It is hereby stipulated in accordance with the statute in such case made and provided that the oath of the referee be waived by the parties to this action.

Dated , , A. D. 18 .

, Attorney for Plaintiff.

, Attorney for Defendant.

No. 28.

STIPULATION AS TO FEES OF REFEREE.

Title of the Cause.

}

It is hereby stipulated and agreed by and between the parties hereto that the fees of , the referee appointed herein by an order bearing date the day of A. D. 18 , shall (*name rate agreed upon*) for each day spent in the business of the reference.

Date. , Attorney for Plaintiffs.

, Attorney for Defendants.

No. 29.

OATH OF WITNESS.

You do solemnly swear (*or affirm*) that the evidence you shall give as to the matters in difference in this action between , plaintiff, and , defendant, shall be the truth, the whole truth, and nothing but the truth.

No. 30.

SUBPENA TO APPEAR AND GIVE EVIDENCE.

The People of the State of New York :

To _____, Greeting :

We command you, that all business and excuses being laid aside, you and each of you appear and attend before _____ the referee appointed by the _____ court at (*specify place*) on the _____ day of _____ A. D. 18____, at _____ o'clock in the _____ noon, to testify and give evidence in a certain action now pending in said court, then and there to be tried, between _____, plaintiff, and _____, defendant, on the part of the _____, and for failure to attend you will be deemed guilty of a contempt of court, and liable to pay all loss and damage sustained by the party aggrieved, and forfeit fifty dollars in addition thereto.

Witness: Hon. _____ of said court at the _____ of said court the _____ day of _____ one thousand eight hundred and _____

By the Court.

Attorney.

No. 31.

SUBPENA TO APPEAR AND GIVE EVIDENCE AND PRODUCE BOOKS, DOCUMENTS, ETC.

The People of the State of New York :

To _____, Greeting :

We command you, that all business and excuses being laid aside, you and each of you appear and attend before _____ the referee appointed by the _____ court at (*specify place*) on the _____ day of _____ A. D. 18____, at _____ o'clock in the _____ noon, to testify and give evidence in a

certain action now pending in said court then and there to be tried between _____, plaintiff, and _____, defendant, on the part of the _____, and that you bring with you and produce at the time and place aforesaid a certain (*describe papers required*) now in your custody, and all other deeds, evidences, and writings which you have in your custody or power concerning the premises. And for a failure to attend you will be deemed guilty of a contempt of court, and liable to pay all loss and damages sustained thereby to the party aggrieved, and forfeit fifty dollars in addition thereto.

Witness: Hon. _____ Chief Justice
 of said court, at the _____ of said court the
 day of _____ one thousand eight hundred and
 Per Curiam. _____, Clerk.
 Attorney. _____

No. 32.

AFFIDAVIT OF SERVICE OF SUBPŒNA.

Title of the cause. }

County of _____, ss.

_____, being duly sworn, says that he is of the age of _____ years and upwards, that at (*describe place of service*) on the _____ day of _____ 18____, he served the within subpoena upon _____, the witness named therein, by delivering to and leaving with him personally a true copy thereof, and at the same time and place exhibiting to him the within original, and paying to him the sum of _____, his fees for traveling to and from the place where he was required to attend in and by the said subpoena, and for one day's attendance thereat; and that he knew the said _____ to be the individual mentioned and described in said subpoena as such witness.

Sworn to before me, this _____ day of
 18____.

No. 33.

ORDER ADJUDGING A WITNESS GUILTY OF CONTEMPT IN
THE IMMEDIATE VIEW AND PRESENCE OF THE COURT.

Present :

Title of the cause. }

Whereas, on the trial of this cause before me, sole referee herein, this day _____ a witness called and sworn in behalf of the _____, being by me directed, did refuse to answer a pertinent and proper question (*or did refuse to produce a certain document or paper then in his possession, describing it*).

On motion of _____, attorney for _____,
it is ordered that the said _____ by reason of the
premises be and he hereby is adjudged guilty of contempt
of court.

It is further ordered that the said _____, for said contempt of _____ which he has been so adjudged guilty, be imprisoned by the sheriff of the county of _____ until he shall be willing to answer such questions (*or until he shall be willing to produce such books and papers*), and until he shall have paid the costs and expenses of these proceedings to punish for said contempt, to wit, the sum of _____, and the sheriff's fees on the warrant to be issued hereon are paid, or until he shall be discharged according to law, and that a warrant issue in accordance herewith.

Dated _____, A. D. 18 ____.

No. 34.

ORDER TO SHOW CAUSE WHY THE ACCUSED SHOULD NOT
BE PUNISHED FOR CONTEMPT.

Title of the Cause. }

It appearing to me by the affidavit of
that on the day of , A. D. 18 , a subpoena

to appear and give evidence, (*or appear and produce books, documents, and papers, describing them*), in the above entitled action, duly issued out of this court, directed to

_____, on the _____ day of _____, A. D. 18____, was, on the _____ day of _____, A. D. 18____, duly served upon, and at the same time the proper fees paid to the said _____, and the said _____

having failed and refused to appear at the time and place in said subpoena named.

It is ordered and directed that the said _____ show
cause before me _____, sole referee herein, at my
office at No. _____ street, in the _____ of _____,
on the _____ day of _____, A. D, 18 _____, at _____ o'clock in the
_____ noon of that day, why he should not be punished for
the said alleged contempt.

It is further ordered that service of this order and the affidavit of the service of the said subpoena be served on , the said on or before the day of , A. D. 18 .

Dated, _____, A. D. 18 ____.

No. 35.

ORDER DIRECTING ATTACHMENT TO ISSUE FOR CONTEMPT
OF COURT.

Title of the cause.

It appearing to me by the affidavit of
that on the day of , A. D. 18 , a subpoena to
appear and give evidence (*or appear and produce books, doc-
uments, and papers, describing them*) in the above entitled
action, duly issued out of this court, directed to
 , was, on the day of , A. D. 18 ,
duly served upon, and at the same time the proper fees
paid to the said , and the said

having failed and refused to appear at the time and place in said subpoena named.

It is ordered that a warrant of attachment issue to the sheriff of _____ county directing him to arrest and bring before this court forthwith (*or at a time and place named*), the said _____ there to answer for the said offense.

_____, Sole Referee.

No. 36.

WARRANT OF ATTACHMENT ON ORDER TO SHOW CAUSE.

The people of the state of New York to the sheriff of the county of _____ greeting :

Whereas on the _____ day of _____, A. D. 18____, by an order made by the _____ court at a trial term thereof held at the office of _____ sole referee in this cause, at No. _____ street, in the _____ of _____, in an action then pending in said court wherein _____ was plaintiff, and _____ was defendant, it appeared by the affidavit of that _____ had been guilty of contempt of court in failing and refusing to obey a subpoena duly issued out of said court to appear and give evidence (*or to produce books, documents or papers, describing them*).

Now, therefore, we command you, pursuant to said order bearing date the _____ day of _____, A. D. 18____, that you arrest the said _____ and have him before this court here sitting forthwith (*or at a time and place fixed in the order*) there and then to answer for the said offense.

Witness _____, sole referee in this cause
at _____ on the _____ day of _____, A. D. 18____.

Attorney for
[Office address.]

Indorsement under § 2275.

The accused may give an undertaking in the sum of _____ dollars for his appearance to answer.

_____, Sole Referee.

No. 37.

UNDERTAKING TO PROCURE DISCHARGE.

The people of the state of New
York on the relation of

against

Whereas, on the day of , A. D. 18 , a warrant of attachment was issued to the sheriff of the county of by sole referee, in an action then pending wherein was plaintiff, and was defendant, directing him (*state directions of warrant*), and whereas by indorsement on said warrant the said sheriff was authorized to accept from said an undertaking in the sum of dollars for his appearance to answer,

Now, therefore, we, the said , and , of by occupation a and , of by occupation a do hereby jointly and severally undertake, pursuant to the statute in such case made and provided, with the people of the state of New York that the said shall and will appear at the time and place in said warrant of attachment named, and abide the decision of the said referee.

Signatures.

Dated,

County of , ss.

one of the sureties on the foregoing undertaking being duly sworn deposes and says, that he is a resident and holder within this state, and is worth the sum of dollars over and above all his debts and liabilities, and exclusive of property exempt by law from execution.

Sworn to before me this }
 day of A. D. 18 . }

County of , ss.

one of the sureties on the foregoing undertaking, being duly sworn, deposes and says that he is a resident and holder within this state, and is worth the sum of dollars over and above all his debts and liabilities, and exclusive of property exempt by law from execution.

Sworn to before me this }
 day of , A. D. 18 . }

State of New York, }
 County of } ss.

On this day of , A. D. 18 , before me personally came to me known, and known to me to be the persons described in, and who executed the foregoing instrument, and severally acknowledged to me that they executed the same.

No. 38.

SHERIFF'S RETURN TO WARRANT OF ATTACHMENT IN CONTEMPT PROCEEDINGS.

I, , Sheriff of the county of do hereby certify and return that I have arrested the said defendant, , by virtue of the within attachment, and have him here in custody in the absence of bail (*or I arrested the said defendant on the within writ and he, pursuant to the endorsement on said writ, before the return day thereof, gave an undertaking, which is herewith filed, and I thereupon discharged said defendant, from arrest.*)

, Sheriff.

Dated , A. D. 18 .

No. 39.

ORDER CONVICTING DEFENDANT OF CONTEMPT, AND
DIRECTING PUNISHMENT.

The people of the state of
New York on the relation of

against

A writ of attachment having been heretofore issued by me commanding and directing the sheriff of the county of _____ to arrest and bring before me forthwith, (*or at the time and place mentioned in the warrant*), to answer for his contempt in (*state cause as set forth in warrant*), and the said sheriff having made his return that he had attached the body of the said defendant _____, and then had him in custody before me, (*or that he had taken from him an undertaking to appear and answer in accordance with the endorsement on said warrant*), and the said defendant being then personally present before me, and the said defendant having been interrogated by me, (*state in full what took place on the examination*), and it appearing to me from the said interrogatories and answers that the said defendant was guilty of the contempt charged, and that such contempt and misconduct was calculated to, and did defeat, impair, impede or prejudice the rights of the said _____,

now on motion of said _____, attorney for the said _____, it is ordered that the said defendant has committed (*recite in full the offense*).

It is further ordered that a fine of _____ dollars be, and the same hereby is imposed on the said _____ for his said misconduct.

It is further ordered that the said _____ pay to the said _____ the sum of _____ dollars, the costs and expenses of these proceedings.

And it is further ordered that the said defendant _____, be and he hereby is directed to stand com-

mitted to the common jail of the county of _____ ,
 to remain there charged with said contempt until said fine
 so as aforesaid imposed, together with said sum of _____
 dollars, costs and expenses of these proceedings, and the
 sheriff's fees herein, be fully paid, unless sooner discharged
 by the court.

Dated, _____ , A. D. 18 _____

_____, Sole Referee.

No. 40.

ORDER ALLOWING AMENDMENT OF PLEADINGS.

Title of the Cause. _____

}

A motion having been duly made at a hearing of this
 cause before me on this _____ day of _____, by
 _____, attorney for _____, for leave to amend his
 _____, by (*inserting therein or striking out as the case may*
be), now on motion of _____, attorney for said
 _____, it is ordered that said motion
 be and the same hereby is granted, upon (*here state terms,*
if any, are imposed).

And it is further ordered that said
 serve his amended pleading upon (*plaintiff's or defendant's*)
 attorney within _____ days from date hereof.

Dated, _____ , A. D. 18 _____ .

_____, Sole Referee.

No. 41.

ORDER GRANTING AN ADJOURNMENT ON TERMS.

Title of the Cause. }

A motion having been made before me by
 , attorney for , now on reading
 and filing the affidavits of , after hearing ,
 of counsel for the in favor of said motion,
 and , of counsel for the
 in opposition thereto, on motion of ,
 attorney for said , it is ordered that the trial
 of this cause stand adjourned to day the day of
 , A. D. , at o'clock in the noon,
 upon condition that (*state terms imposed*).

Dated, , A. D. 18 .

, Sole Referee

No. 42.

NOTICE TERMINATING REFERENCE FOR FAILURE TO DELIVER OR FILE REPORT WITHIN SIXTY DAYS.

Title of the Cause. }

Sirs :

You will please take notice that the report of the referee herein not having been delivered or filed within sixty days from the time when the cause or matter was finally submitted, as required by statute, the elects to terminate the reference herein.

Dated, , A. D. 18 .

Yours, etc.

To , Attorney for

Referee,

and

Attorney for

No. 43.

REQUESTS TO FIND.

Title of the Cause. }

Sir :

The plaintiff hereby requests you make findings of fact and conclusions of law as follows :

Findings of fact—

- 1.
- 2.
- 3.

Conclusions of law—

- 1.
- 2.
- 3.

Dated, , A. D. 18 .

Yours, etc.,

, Attorney for Plaintiff.

No. 44.

GENERAL FORM OF REPORT OF SOLE REFEREE TO HEAR
AND DETERMINE ALL THE ISSUES.

Title of the Cause. }

To the Court.

I, the undersigned sole referee, duly appointed by an order of this court bearing date the day of , A. D. 18 , to hear and determine the above entitled action and all the issues therein, do hereby report :

I. I have taken and subscribed the statutory oath which is hereto annexed, (*or the oath of the referee was waived by the parties, as appears by the stipulation hereto annexed*).

II. I have been attended by the parties and their counsel, _____, Esq., appearing in behalf of plaintiff, _____, and _____, Esq., appearing in behalf of defendant, _____, and having heard the proofs and allegations of the parties, and the arguments of counsel thereon, I do find as follows:

III. I find as matter of fact—

- 1.
- 2.
- 3.

And as conclusions of law—

- 1.
- 2.
- 3.

4. That there is now due from the defendant to the plaintiff the sum of _____ dollars, with interest from _____, and I order judgment therefor with costs to be taxed, (*or that defendant is entitled to judgment, dismissing the complaint, with costs to defendant to be taxed, and I order judgment accordingly*).

Dated, _____, A. D. 18 ____ .
_____, Sole Referee.

(*If an accounting is necessary and the referee decides to proceed and take the account, insert*). That an account should be had and taken of (*state matters as to which and how the account should be taken*), and I order judgment for such account, and that plaintiff (*or defendant*) recover costs.

Dated, _____, A. D. 18 ____ .
_____, Sole Referee.

No. 45.

GENERAL FORM OF REPORT WHERE MORE THAN ONE
REFEREE HAS BEEN APPOINTED.

Title of the Cause.

$$\left. \begin{array}{l} \text{ } \\ \text{ } \end{array} \right\}$$

To the Court.

We the undersigned referees, duly appointed by an order of this court bearing date the day of A. D. 18 , to hear and determine the above entitled action and all the issues therein, do hereby report :

I. We have severally taken and subscribed the statutory oath which is hereto annexed, (*or the oath was waived, etc., as in form 44*).

II. We have been attended by the parties and their counsel, _____, Esq., appearing for the plaintiff, and _____, Esq., appearing for the defendant, _____ and all of us have heard all the proofs and allegations of the parties, and the arguments of counsel thereon, all have met to prepare the report, and we do find and report as follows :

III. We find as matters of fact—

1.

2.

3.

And as conclusions of law—

1.

2.

3. That there is now due from the defendant to the plaintiff the sum of _____ dollars, with interest from the _____ day of _____, A. D. 18____, for which amount we order judgment with costs for the plaintiff (*if defendant is entitled to judgment, change as in form No. 44*).

} Referees.

No. 48.

REPORT WHERE DEFENDANT FAILS TO APPEAR ON THE TRIAL.

Title of the Cause. }

To the Court.

I, the undersigned sole referee, duly appointed by an order of this court bearing date the day of , A. D. 18 , to hear and determine the above entitled action and all the issues therein, do hereby report :

I. I have taken and subscribed the statutory oath which is hereto annexed, (*or the oath has been duly waived, etc.*)

II. I have been attended on the trial by the plaintiff in person and , his attorney. Due proof of proper service of notice of trial upon the defendant's attorney was made to me, and the defendant having failed to appear, I do order judgment for the plaintiff for the sum of dollars, and interest from the day of , A. D. 18 , the amount claimed in the complaint, with costs.

Dated,

, Sole Referee.

(*If judgment can be taken only on application to the court, after reciting defendant's failure to appear, insert*). I have heard the allegations and proofs of the plaintiff, and I find there is due to the plaintiff from the defendant the sum of (*or that the plaintiff is entitled to recover from the defendant the sum of dollars damages*), for which amount I order judgment for the plaintiff, with costs to be taxed.

Dated,

, A. D. 18 .

, Sole Referee.

I do find as matter of law that the plaintiff (*or defendant*) is entitled to judgment on the demurrer herein with costs, and I direct an interlocutory judgment sustaining (*or overruling*) said demurrer to be entered herein, with leave to plaintiff (*or defendant*) to amend his pleading upon payment of said costs, (*or other terms,*) and in case said plaintiff (*or defendant*) fails to comply with the terms hereby imposed within _____ days from notice of the entry of said interlocutory judgment, that final judgment be entered for the plaintiff (*or defendant*) with costs.

Dated, _____, A. D. 18 ____.

_____, Sole Referee.

No. 51.

REPORT WHERE INCREASED DAMAGES ARE GIVEN BY STATUTE.

As in form No. 45 to finding as a conclusion of law that plaintiff (*or defendant*) is entitled to receive a sum named as damages, and add _____ and in accordance with the statute in such case made and provided I order judgment for the plaintiff (*or defendant*) in the sum of (*increased damages*) dollars damages with costs.

Dated, _____, A. D. 18 ____.

_____, Sole Referee.

No. 52.

REPORT WHERE PLAINTIFF RECOVERS LESS THAN DE- FENDANT OFFERED UNDER § 736 OF THE CODE.

As in form No. 45 to the finding as a conclusion of law that plaintiff has suffered damage in a sum named, and add _____

And I do further find and report, in accordance with the statute in such case made and provided, that defendant's attorney duly served with his answer in this cause an offer, that if defendant failed in his defense, damages might be assessed at the sum of dollars, which said offer was not accepted by the plaintiff.

And I do further find and report, that in accordance with the statute in such case made and provided, I have ascertained and determined that the amount of the expenses necessarily incurred by defendant in preparing for the trial of the question of damages is the sum of dollars, which being deducted from the amount of damage allowed to plaintiff herein, leaves the sum of dollars, for which said sum of dollars I do order judgment for the plaintiff, with costs.

Dated, , A. D. 18 .

, Sole Referee.

No. 53.

AFFIDAVIT OF REFEREE AS TO FEES.

Caption as in No. 5. }

, the referee herein, being

duly sworn, deposes and says :

I. The trial of this cause was begun before me on the day of , A. D. 18 , and was concluded on the day of , A. D. 18 , when the cause was finally submitted. The number of hearings at which evidence was taken was , to wit, on the (*give dates*), the number spent in hearing arguments of counsel was , to wit: on the (*give dates*), and the number of adjourn-

ments at the request of parties without previous notice to me was _____, on the (*give dates*), and the number of days spent in considering the case and preparing the report was as follows (*give dates*):

II. The case was intricate and difficult on account of the number of sittings before me, the complicated nature of the accounts presented, and the difficult questions of law involved. The plaintiff presented _____ requests to find matters of fact and conclusions of law, and the defendant made _____ requests. (*State any other matter showing the cause was difficult or complicated*).

Jurat.

Signature.

No. 54.

CERTIFICATE OF REFEREE THAT THE ACTION IS A PROPER ONE FOR AN EXTRA ALLOWANCE.

Title of the Cause.

}

I, _____, sole referee, before whom the issues in the above entitled action were tried, do hereby certify, that this action is brought to recover (*state object*), that the answer is (*state contents of answer*), that the amount claimed in the summons was (*or the value of the property involved was*) _____, that the amount recovered was _____, that the number of hearings at which testimony was taken before me was _____, that many difficult questions were involved, and in the opinion of the undersigned this case was difficult and extraordinary within the meaning of section 3253 of the code of civil procedure.

Dated, _____, A. D. 18 .

_____, Sole Referee.

No. 55.

CERTIFICATE FOR COSTS, OR INCREASED COSTS.

Title of the Cause. }

I, _____, sole referee to hear and determine all the issues in the above entitled action, do hereby certify, that upon the trial the title to real property came in question (*or any other matter entitling party to increased costs*).

Dated, _____, A. D. 18 .
_____, Sole Referee.

No. 56.

EXCEPTIONS TO RULING OF REFEREE.

Title of the Cause. }

Sirs :

You will please take notice that the plaintiff (*or defendant*) hereby excepts to the following rulings of the referee in the above entitled action.

1. He excepts to the refusal of the referee to find in accordance with the first request. (*Repeat as to each request.*)

Yours, etc.,

Dated, _____, A. D. 18 .

To _____, Plaintiff's Attorney,
(Office address,)

, Defendant's attorney,

and

, Clerk.

No. 57.

EXCEPTIONS TO THE REPORT OF THE REFEREE.

Title of the cause. }

Sirs :

You will please take notice that the plaintiff (*or defendant*) hereby excepts to so much of the first conclusion of law as finds (*state part excepted to*).

2. He excepts to the second conclusion of law and each and every part thereof.

Yours, etc.,

Dated,

, A. D. 18 .

Attorney for

To Messrs.

, Attorney for

and

, Clerk.

No. 58.

CASE ON APPEAL.

1 Title of the Cause. }

2 This action was begun by the service of a summons
3 (*or summons and complaint*) upon ,
4 on the day of , A. D. 18 .

5 The summons, complaint, answer, and order of refer-
6 ence are included in the judgment roll hereto annexed,
7 which forms part hereof. (*If changes were made in the*
8 *parties, state them.*)

9 The issues herein, in pursuance of said order of ref-
10 erence, came on to be tried before said

No. 59.

NOTICE ENDORSED ON CASE.

Title of the Cause.

$$\left. \begin{array}{l} \text{ } \\ \text{ } \end{array} \right\}$$

Sir :

You will please take notice that the within is a copy of the plaintiff's (*or defendant's*) proposed case herein.

Dated, _____, A. D. 18 ____.

_____, Attorney for _____.

To _____, Attorney for

No. 60.

PROPOSED AMENDMENTS TO CASE.

Title of the Cause.

$$\left. \begin{array}{l} \text{ } \\ \text{ } \end{array} \right\}$$

Sir :

You will please take notice that the plaintiff (*or defendant*), proposes the following amendments to the proposed case herein :

FIRST AMENDMENT.

Line of page . Strike out words (*specify ones ob-
jected to*), and insert instead thereof (*state corrections*). .

SECOND AMENDMENT.

Strike out all of lines on page
Yours, etc.

Dated, _____, A. D. 18 ____.

_____, Attorney for _____.

To _____, Attorney for _____

No. 61.

NOTICE OF SETTLEMENT OF CASE.

Title of the cause. }

Sir :

You will please take notice, that the proposed case and amendments thereto will be presented to _____, referee herein, at his office No. _____ street, in the _____ of _____, on the _____ day of _____ A. D. 18____, at _____ o'clock in the _____ noon, for settlement.

Yours, etc.

Dated, _____, A. D. 18 ____.

To _____, Attorney for

, Attorney for

No. 62.

ORDER SETTLING CASE.

The foregoing case and exceptions was settled before me this day, and I order the same filed as so settled, and to be annexed to the judgment roll herein. *(If any of the exhibits are to be printed at length add) Plaintiff's exhibits Nos. (designate them), and defendant's exhibits (designating them), to be printed at length.*

Dated, _____, A. D. 18__.

, Sole Referee.

No. 63.

BILL OF EXCEPTIONS.

1 Title of the Cause. }

2 This action was begun by the service of a summons
3 (*or summons and complaint*) upon ,
4 on the day of , A. D. 18 .

5 The summons, complaint, answer, and order of refer-
6 ence are included in the judgment roll hereto annexed,
7 which forms part hereof.

8 (*If changes were made in the parties state them.*)

9 The issues herein, in pursuance of said order of ref-
10 erence, came on to be tried before said
11 , sole referee herein, on the day of
12 , A. D. 18 , and subsequent days, when, the
13 referee, having taken the statutory oath, (*or the oath of*
14 *the referee having been duly waived*), the following pro-
15 ceedings were had and taken :

16 The plaintiff offered in evidence, to maintain the is-
17 sues on his part the following instrument, (*insert the pa-*
18 *per offered*). Defendant objected on the ground (*state*
19 *grounds of objection*). The objection was overruled, and
20 the defendant excepted.

21 Plaintiff then called as a witness
22 , who, being duly sworn, testified as
23 follows :

24 Q. (*Insert question.*)

25 Defendant objected to the question on the ground
26 that (*insert ground of objection*).

27 The objection was overruled, and defendant excepted.

28 Answer. (*Insert so much of the answer as is necessary*
29 *to raise the question of law.*)

30 Being cross-examined the said
31 testified as follows : (*Insert so much of testimony*

- 1 *as is necessary to raise the question of law.*)
 2 Plaintiff then rested.
 3 Defendant moved to dismiss the complaint on the
 4 grounds (*state grounds of motion*).
 5 The motion was denied, and defendant excepted.
 6 Defendant called to maintain the issues on his part,
 7 who, being sworn, testified as follows :
 8 Q. (*Insert question.*)
 9 Plaintiff objected to the question on the grounds, (*state*
 10 *grounds of objection*).
 11 The objection was sustained, and defendant excepted.
 12 Defendant then rested.
 13 Defendant moved for judgment on the grounds, (*state*
 14 *grounds*).
 15 The motion was denied, and defendant excepted.
 16 (*If requests to find were served insert them ; recite the*
 17 *making of the report, etc., as in No. 58.*)

Amendments are to be made, and the bill of exceptions settled in the same manner as where a case is made and settled.

No. 64.

GENERAL FORM OF ORDER ON INTERLOCUTORY REFERENCE MADE ON MOTION.

Caption as in No. 1.

}

On reading and filing the affidavits of (*recite papers used on motion*) and notice of motion, after hearing,
 , Esq., of counsel for
 in favor of said motion, and , Esq.,
 of counsel for , opposed. On motion of
 , attorney for
 , it is ordered, etc.,
 with dollars costs of said motion.

No. 65.

GENERAL FORM OF ORDER ON INTERLOCUTORY REFERENCE MADE BY THE COURT OF ITS OWN MOTION.

Caption as in No. 1.

}

This cause coming on to be tried at a special term of this court, before Hon. _____, a justice thereof, and it appearing to said court that (*state reason why reference is ordered*) is necessary to enable the court to render a proper judgment thereon, (*or for the information of the court,*) after hearing counsel for the respective parties, it is ordered that it be referred to Esq., to (*state object and scope of reference*).

No. 66.

SUMMONS TO ATTEND BEFORE REFEREE.

Title of the Cause.

}

By virtue of an order made in the above entitled action bearing date the _____ day of _____, A. D. 18____, I, _____, the referee appointed by said order, do hereby summon you to appear before me, at my office, No. _____ street, in the _____ of _____, on the _____ day of _____, A. D. 18____, at _____ o'clock in the _____ noon, to attend a hearing of the matters in said order named, in reference before me, as such referee, pursuant to said order, and hereof fail not at your peril.

Dated, _____ the _____ day
of _____, A. D. 18____.

_____, Referee.

UNDERWRITING WHERE BOOKS AND PAPERS ARE REQUIRED.

And you are hereby directed to bring with you, and deposit with me all books of account, bills, notes, documents, and papers in your possession, or under your control, or in the possession of any one in your behalf relating to (*state matters as to which accounting is ordered*).

 No. 67.

GENERAL FORM OF REPORT ON INTERLOCUTORY REFERENCE.

Title of the Cause.

}

To the

Court.

I, the undersigned referee, duly appointed by order of this court bearing date the day of , A. D. 18 , to (*give epitome of order*), do hereby report :

I. I have taken the statutory oath which is hereto annexed, (*or the oath of the referee was waived as appears by the stipulation hereto annexed*).

II I have summoned the several parties to appear and attend before me on this reference, as appears by the summons hereto annexed marked Schedule "A."

III. I have been attended by (*state appearances*).

IV. I have heard the testimony of the parties and witnesses produced before me, which said testimony is hereunto annexed, marked Schedule "B."

(*If the order was to ascertain the facts, add—*)

V. And I do find the following to be the facts :

1. I find as matter of fact,
2. I find as matter of fact,

(*If the referee is directed to report with his opinion, add after the findings of fact—*)

VI. I am therefore of the opinion that, etc.

No. 68.

AFFIDAVIT OF PRODUCTION OF BOOKS AND PAPERS.

Caption as in No. 5. }

A. B., the defendant, (*or plaintiff*) in this action, being duly sworn, deposes and says :

I. That the books and papers, of which a schedule is hereto annexed marked "A," are all the books, documents, and papers in his possession or under his control, or in the possession or under the control of any person for his benefit or use, relating to the matters in difference in this action or called for by the subpœna herein (*or ordered to be produced by the referee herein. If any are excepted for any reason, as being lost, etc., add*) except (*naming them*), which have been (*lost or destroyed*) as the case may be.

Jurat.

Signature.

No. 69.

CERTIFICATE OF NON-PRODUCTION OF BOOKS AND PAPERS.

Title of the Cause. }

To the Court.

I, the undersigned referee herein appointed by an order bearing date the day of , A. D. 18 , to (*state contents of order*) hereby certify that the above-named defendant, (*or other person*) was duly directed to produce before me all books, documents, and papers in his possession or under his control relating to the matters in difference in this case, and to the accounts directed to be taken herein. Due proof of the service of the summons (*or order, or subpœna*) upon the said defendant (*or other person*) has been made before me. The said defendant has not produced before me such books, documents, and papers, or any such. All which is hereby certified and submitted.

Dated, , A. D., 18 .

, Referee.

No. 70.

ORDER OF REFERENCE TO TAKE AND STATE AN ACCOUNT.

Caption as in No. 1.

}

On reading and filing the affidavits of
 , and , and on all the
 pleadings and proceedings in this cause,

It is ordered that it be referred to
 Esq., as sole referee, to take and state an account of all
 dealings between the said plaintiff and defendant relating
 to (*state matters as to which account is to be taken*), and for
 the purpose of taking said account the parties are directed
 to produce before said referee all books, papers, docu-
 ments, and writings in their custody or under their control
 having reference thereto; that the said parties may be ex-
 amined in reference thereto in such manner as the referee
 shall direct. The said referee shall make all just allow-
 ances to the parties as between themselves, and state what,
 from said account, appears to be due from one party to the
 other, and shall also state his reasons for the allowance or
 disallowance of any claim by each against the other (*insert*
any other directions deemed necessary. *If the account is to be*
taken before trial add) and on the coming in of said report
 either party may bring the case to trial.

And it is further ordered that the question of costs, and
 all other questions are reserved until the coming in of said
 report and the final hearing of this cause.

No. 71.

REPORT OF REFEREE TO TAKE AND STATE AN ACCOUNT.

Title of the Cause. }

To the Court.

I, the undersigned referee, duly appointed by order of this court bearing date the day of , A. D. 18 , to (*give an epitome of the order*) do hereby report:

I. I have taken the statutory oath, which is filed herewith, (*or the oath was waived as appears by the stipulation filed herewith*).

II. I have summoned the several parties to appear and attend before me, as appears by said summons hereto annexed, marked Schedule "A."

III. I have been attended on said reference by (*state appearances*).

IV. I have heard the proofs and allegations and taken the testimony of the parties and witnesses which has been subscribed by them, and it is hereto annexed marked Schedule "B."

V. I have adjusted a mutual account between the parties hereto, making all just allowances and showing what, on striking a balance, appears to be due from each party to the other, which said account is hereto annexed marked Schedule "D."

VI. The said is indebted to the said , in the sum of dollars, with interest from (*date of the account*), etc.

Dated, , A. D. 18 .

, Referee.

No. 72.

AFFIDAVIT TO OBTAIN REFERENCE TO TAKE DEPOSITION
TO BE USED ON MOTION.

Caption as in No. 5.

}

I. He is the plaintiff (*or defendant*) in the above entitled action. He intends to make (*or oppose*) a motion in this cause, for (*state object of motion*), of which notice has been given.

II. On said motion it will be necessary for this deponent to have the affidavit of A. B. as to the following facts which, this deponent is informed and verily believes, are within the personal knowledge of said A. B., viz.: (*state facts desired to be brought out*).

III. The reasons why such affidavit is necessary are (*state reasons*).

IV. The said A. B. refuses to make such affidavit although one (*embodying the facts desired*) has been drawn and presented to him, with a request for verification at no cost to him, nor did he deny his knowledge of the facts desired.

V. The said A. B. resides (*or has a place of business*) at
street, in the of .

VI. That no previous application for an order to take the deposition of said A. B. has been made.

Jurat.

Signature.

No. 73.

ORDER APPOINTING REFEREE TO TAKE DEPOSITION OF A
PARTY TO BE USED ON MOTION.

Caption as in No. 1.

}

On reading and filing the affidavit of
 , showing that a motion is about to be made, (*or
 has been made in this court*), and that the affidavit of
 is necessary thereon, and said
 has refused to make said
 affidavit, on motion of
 attorney for plaintiff (*or defendant*) it is ordered that
 , Esq., be and he hereby is ap-
 pointed to take the affidavit of said
 , pursuant to section 885 of the Code of Civil Pro-
 cedure.

(*If the deposition is not to be delivered to the attorney of the
 party add—*) It is further ordered that said deposition, when
 taken, is to be (*state what disposition is to be made thereof.*)

No. 74.

REPORT OF REFEREE TO TAKE DEPOSITION TO BE USED
ON MOTION.

Deposition of , taken to
 be used on a motion made in this cause for (*state nature of
 motion*), taken before the undersigned, pursuant to an order
 of this court made herein on the day of ,
 A. D. 18 , of which a copy is hereto annexed.

Title of the Cause.

State of New York, }
 County of } ss.

being duly sworn, deposes and says, (*or Q. insertiny ques-
 tion ; A. inserting answer.*)

Sworn to before me, this day of

A. D. 18 .

Signature of witness.

, Referee.

No. 75.

ORDER APPOINTING REFEREE TO EXAMINE PARTY BEFORE TRIAL.

Title of the Cause.

}

On reading and filing the affidavit of _____ ,
and on motion of _____ , attorney for _____ ,

It is ordered that the said _____ ,
in said affidavit named, appear before _____ ,
who is hereby appointed referee to take the
deposition of said _____ before
trial, at the office of said referee, No. _____ street,
in the _____ of _____ , on the _____ day of
_____, A. D. 18 _____ , at _____ o'clock in the _____ noon,
to be examined under Article 1, Title 3, Chap. IV. of the
Code of Civil Procedure.

It is further ordered that said _____
shall be examined only as to (*state matters as to which the
examination is limited*).

It is further ordered that a service of a copy of this or-
der upon the said _____ , on or
before the _____ day of _____ , A. D. 18 _____ , shall be suf-
ficient.

(*If the person to be examined is confined in prison or jail,
add*)—And it is further ordered that the person in charge
of (*naming jail or prison*) produce said _____
_____ , at said prison (*or jail*) subject to the follow-
ing conditions, (*state restrictions and regulations*).

Dated, _____ , A. D. 18 _____ .

No. 76.

ORDER OF REFERENCE TO TAKE PROOF ON DEFAULT
WHERE SUMMONS WAS SERVED BY PUBLICATION.

Caption as in No. 1.

}

On the summons and complaint herein, and on the affidavit of _____, verified the day of _____ A. D. 18 __, reciting the proceedings herein, and on motion of _____, attorney for plaintiff, it is ordered that it be referred to _____, Esq., counsellor at law, to take proof of the matters alleged in the complaint, (*or other subject of inquiry,*) and to examine the plaintiff, or his agent, on oath, respecting any payment made to said plaintiff, or to any one for his use, and to report to this court with all convenient speed.

No. 77.

ORDER FOR THE EXAMINATION OF AN EXPECTED PARTY.

In the matter of the application

of

A _____ B _____,

to take and perpetuate the testimony of _____

On the affidavit of _____ hereto annexed, and on motion of _____, attorney for said A. B., it is ordered that the said _____ appear before _____, the referee hereby appointed to take the examination of said _____, at his office, No. _____ street, in the _____ of _____, on the _____ day of _____ A. D. 18 __, at _____ o'clock in the _____ noon, and be examined as to (*state limits of examination*).

(*If the person to be examined is in custody add—*) It is further ordered that said _____ be brought before said referee, at such jail (*or prison*), under the following conditions (*state conditions*). It is further ordered that service of this order on said _____

_____, on or before the _____ day of _____, A. D. 18 _____, shall be sufficient.

Dated, _____, A. D. 18 _____.

/ No. 78.

CERTIFICATE OF REFEREE TO DEPOSITION OF PARTY OR EXPECTED PARTY.

Title of the Cause or Proceeding
(*as in No. 77*).

Deposition of _____, taken by _____, referee, under the provisions of Chap. IX., Tit. III. of the Code of Civil Procedure, under the annexed order, on the _____ day of _____, A. D. 18 _____, and on the adjourned days, _____, Esq., appearing for _____, and _____, Esq., appearing for _____.

Said _____ was first duly sworn by _____, referee, and on examination by _____ testified as follows :

Q.

A.

And on cross-examination testified as follows :

Q.

A.

I, _____, referee, appointed by the annexed order to take the examination of _____, do hereby certify that the foregoing deposi-

tion was taken before me under the provisions of the annexed order at the times in the said depositions set forth, that every answer of said _____, on such examination is fully set forth, as required by either party. I carefully read said deposition to said _____, and he then subscribed the same in my presence.

Dated, _____, A. D. 18 .

_____, Referee.

No. 79.

NOTICE OF MOTION FOR REFERENCE TO ASCERTAIN DAMAGES ON INJUNCTION.

Title of the cause. }

_____.

Sirs:

You will please take notice, that on the undertaking given herein, and on all the pleadings and proceedings in this cause, a motion will be made at a special term of this court to be held at the _____, in the _____ of _____, on the _____ day of _____, at _____ o'clock, _____ m., of that day, or as soon thereafter as counsel can be heard, for a reference to ascertain the damages sustained by the (*plaintiff, or defendant*) by reason of the injunction granted herein on the _____ day of _____, A. D. 18 , and for such further or other order as may be just, and for the costs of this motion.

Date.

Signature.

Address.

No. 82.

SUMMONS TO ATTEND ON REFERENCE TO APPOINT
RECEIVER.

Title of the Cause. }

To
Sir :

You are hereby notified to attend before the undersigned referee, appointed by order bearing date the day of , A. D. 18 , to appoint a receiver in this cause, at his office, No. street, in the city of , on the day of , at o'clock, . m., when he will receive proposals for a receiver under said order, a copy whereof has been served upon you.

(*If personal attendance of a party is required for examination add*)—the personal attendance of (*defendant or plaintiff*) is required for examination.

Date.

Signature of Referee.

Signature of moving party's attorney.

Address.

No. 83.

PROPOSAL OF NAMES FOR RECEIVER.

Title of the cause. }

The above-named plaintiff (*or defendant*) proposes , of , for receiver of (*recite property named in the order*) mentioned in the order of this court, bearing date the day of , A. D. 18 , and the said proposes , and , as his sureties.

Dated, , A. D. 18 .

Signature.

To , Referee.

No. 84.

REFEREE'S REPORT NOMINATING RECEIVER.

Title of the Cause. }

To the Court.

Pursuant to an order of this court, duly made herein, bearing date the day of , A. D. 18 , whereby the undersigned was directed to nominate a suitable person to be appointed receiver of (*specify property named in the order*), and to ascertain the proper security to be given by him, I , the referee named in said order, respectfully report :

I. I caused motion of hearing to be served on the several parties hereto as appears by Schedule A. hereto annexed.

II. I have been attended on said reference by counsel for the respective parties as follows :

 , Esq., appearing for ,
 , Esq., appearing for , (*if any failed to appear add*)—failing to appear pursuant to said notice.

III. That was proposed on behalf of plaintiff, and on behalf of defendant; and upon examination, and hearing of counsel it appeared that said was better qualified to execute the duties of the receivership, and I therefore nominate him as a suitable person to be appointed such receiver.

IV. That the amount of security that should be given by said receiver should be dollars, that said proposed as his sureties , of , and , of , and being satisfied by their affidavits and other proof that they were each of them worth the sum of

dollars over and above all their debts and liabilities, and property exempt from levy and sale under execution, I approve and recommend them as such sureties.

V. That the said _____, and _____, and _____, as sureties jointly and severally executed a bond in the usual form to the people of this state in the penalty of _____ dollars, conditioned for the faithful discharge by the said _____ of his duties as receiver aforesaid, which said bond appears to me sufficient in form and substance, which is herewith submitted, marked Schedule B. Schedule C hereto annexed contains the evidence and other proceedings on said reference.

Date.

_____, Referee.

No. 85.

ORDER OF REFERENCE TO APPOINT A RECEIVER.

Caption as in No. 1.

}

On reading and filing the affidavit of _____, and _____, verified the _____ day of _____, A. D. 18____, and notice of motion and on all the pleadings and proceedings in this cause, after hearing _____, of counsel for _____, in favor of said motion, and _____, of counsel for _____ in opposition thereto, on motion of _____, attorney for said _____.

It is ordered that _____, Esq., counsellor at law, be, and he hereby is, appointed referee

to appoint a receiver of (*specify carefully the property*), and that such referee take from such receiver security for the faithful performance of his duties as such, viz., a bond to the people of this state in the sum of dollars, with two or more sufficient sureties to be approved by said referee, and file the same with the clerk of (*this court or the court of*)

And it is further ordered, that upon filing of said bond, and the referee's report, such receiver shall have the usual powers, and perform the usual duties of receivers of this court, and shall have power (*enumerate any special powers and duties imposed upon him.*)

And it is further ordered that thereupon the said , deliver to such receiver the property named herein, on demand of such receiver.

No. 86.

REFEREE'S REPORT OF APPOINTMENT OF RECEIVER.

1 Title of the Cause. }

To the Court.

Pursuant to an order of this court, duly entered in this action on the day of , A. D. 18 , whereby it was referred to the undersigned to appoint a receiver of (*insert description of the property as given in the order*), and take from such receiver the proper security, I, , the referee therein named, do hereby report.

I. I have caused a summons to attend on the hearing before me in the matter of such appointment as appears by Schedule A, hereto annexed.

Signature.

No. 87.

ORDER APPOINTING REFEREES ON APPEAL FROM COMMISSIONER OF HIGHWAYS.

Title of the Proceeding. }

Whereas, _____, of the town of _____, county of _____, in the State of New York, did, on the _____ day of _____, A. D. 18 _____, appeal to me, the undersigned county judge of said _____ county, from the determination of _____, commissioner of highways in said town of _____, made in his order filed herein on the _____ day of _____, A. D. 18 _____, and from so much of said order and determination as (*recite part appealed from*). Now, therefore, pursuant to the statute in such case made and provided, I do hereby appoint _____, of the town of _____, and _____, of the town of _____, and _____, of the town of _____, all residents of said county of _____, referees, to hear and determine said appeal.

Dated, _____, A. D. 18 _____.

_____, County Judge.

No. 88.

ORDER APPOINTING REFEREES ON APPEAL FROM COMMISSIONER OF HIGHWAYS WHEN COUNTY JUDGE IS DISQUALIFIED.

Title of the Proceeding. }

Whereas, _____, of the town of _____, county of _____, and state of New York, did, on the _____ day of _____, A. D. 18 _____, appeal to the county judge of said _____ county,

from the determination of _____,
 commissioner of highways of said town of _____,
 made in his order filed herein on the _____ day of _____,
 A. D. 18____, and from so much of said order and determination
 as (*recite part appealed from*), and whereas said
 county judge resides in the said town of _____,
 (*or state other statutory disability*), Now, therefore, pursuant
 to the statute in such case made and provided, I do hereby
 appoint _____, of the town of _____,
 _____, and _____, of the
 town of _____, and _____,
 of the town of _____, all residents of said county
 of _____, referees, to hear and determine said appeal.
 Dated, _____, A. D. 18____.
 _____, Justice of the Sessions.

No. 89.

NOTICE TO REFEREES OF THEIR APPOINTMENT.

Title of the Proceeding. }

Sirs :

You will please take notice that by the order which is
 hereto annexed you have been duly appointed, in pursuance
 of the statute in such case made and provided, as referees,
 to hear and determine an appeal made by

_____, from the order and determination of _____,
 _____, commissioner of highways for the
 town of _____, and county of _____,
 as appears by his order bearing date the _____ day of _____,
 _____, A. D. 18____, and filed on the _____ day of _____,
 _____, A. D. 18____.

You will also take notice that the papers herewith en-
 closed and delivered are all the papers related to the mat-
 ters referred.

Dated, _____, A. D. 18____.

County Judge.

To (*naming referees*).

No. 90.

NOTICE BY REFEREES TO COMMISSIONER OF HIGHWAYS.

1 Title of the Proceeding. }

Sir :

You will please take notice that by an order duly made herein on the day of , A. D. 18 , we have been appointed referees to hear and determine the appeal made and taken by , of the town of , in the county of , from the determination made by your order bearing date the day of , A. D. 18 , in (*state cause of appeal*), and that a hearing before us will be held at the office of , in the town of , county of , on the day of , A. D. 18 , at o'clock in the noon, to determine said appeal.

Yours, etc.

Dated, , A. D. 18 .

To

Referees.

Commissioner of Highways.

No. 91.

NOTICE OF HEARING TO APPELLANT ON APPEAL FROM COMMISSIONER OF HIGHWAYS.

Title of the Proceeding. }

Sir :

You will please take notice that the hearing on your appeal from the determination of commissioner of highways

of the town of _____, will be had at the office of
 _____, in the town of _____,
 on the _____ day of _____, A. D. 18 _____, at _____ o'clock
 in the _____ noon.

Dated, _____, A. D. 18 _____.

_____, Referee.

To

_____, Appellant.

No. 92.

SUBPCENA BY REFEREES ON APPEAL FROM COMMISSIONER OF HIGHWAYS.

The people of the state of New York.

To _____, Greeting:

You and each of you are hereby directed and commanded
 to appear before us at the office of
 _____, in the town of _____, in the county of _____
 _____, on the _____ day of _____, at
 _____ o'clock in the _____ noon, there to give evidence and testify
 in the matter of the appeal of _____,
 from a determination of _____, com-
 missioner of highways for said town of _____,
 on the part of said (*appellant or commissioner*).

Witness our hands this _____ day

of _____, A. D. 18 _____.

Referees.

No. 94.

AGREEMENT TO REFER A DISPUTED CLAIM.

In the matter of the claim of

against

The estate of , late of
, deceased,

, having presented a claim
against the estate of , late of
, deceased, to , executor (*or ad-
ministrator*) of said estate, and the said
, executor as aforesaid, having rejected said claim
upon the grounds that (*state reasons in full*), we the said
(*claimant*) and , executor as
aforesaid, pursuant to the statute in such case made and
provided, do hereby agree that said claim be referred to
, a disinterested person, to
hear and determine the same.

Dated, , A. D. 18 .

, Claimant.

, Executor.

No. 95.

SURROGATE'S APPROVAL TO BE ENDORSED ON AGREEMENT
TO REFER.

I, , surrogate of the county
of , hereby approve of the referee
named in the within agreement.

Dated, , A. D. 18 .

, Surrogate.

No. 96.

ORDER REFERRING DISPUTED CLAIM.

Title as in 92.

}

On reading and filing the agreement between the above named _____, claimant, and _____, executor, and the approval of the surrogate of the county of _____, endorsed thereon, on motion of _____, attorney for _____, Ordered that the said claim be, and the same hereby is, referred to _____, to hear and determine.

Dated, _____, A. D., 18 ____.

_____, Clerk of the county of _____

No. 97.

ORDER OF REFERENCE ON APPLICATION TO MORTGAGE, LEASE, OR SELL THE REAL PROPERTY OF AN INFANT.

Title of the Proceeding.

}

On reading and filing the petition of _____, and on all the proceedings on this application, on motion of _____, attorney for _____, it is ordered that it be referred to _____, Esq., counsellor at law, to examine into the truth of the allegations of the petition, to hear the allegations and proofs of all persons interested in the property, or otherwise interested in the application, and report his opinion thereupon, together with the testimony, with all convenient speed.

No. 98.

REPORT OF REFEREE ON PROCEEDINGS TO MORTGAGE,
ETC., REAL ESTATE OF AN INFANT.

Title of the Proceeding. }

To the Court.

I, _____, the referee duly appointed by order of this court, bearing date the _____ day of _____, A. D. 18____, to (*give epitome of order*) do hereby report :

I. I have taken and subscribed the statutory oath which is hereto annexed.

II. I have been attended by the counsel for the respective parties, _____, appearing for the petitioner, and _____, appearing for _____, and have heard all the proofs and allegations of all persons interested in the property, or in the application. The proofs taken by me are hereto annexed, marked Schedule "A."

III. I find that the said infant (*or lunatic, etc.*) is the owner of (*or is entitled to a share in*) the following real property, to wit :

1. A house and lot situated on _____ street, in the city of _____, of the value of _____ dollars ; said property is encumbered by (*state nature and amount of encumbrance*), and yields a net revenue of _____ dollars *per annum*, (*or is wholly unproductive*).

2. Four vacant lots (*describe property as above*).

IV. I find that the proceeds of said property are wholly insufficient for the comfortable support, education, and maintenance of said infant (*or lunatic*).

V. I further find that _____, mother of said infant, is entitled to a dower in said premises, that in the event of sale of said premises she is willing to accept a gross sum in lieu thereof, and that the value of

said life estate, computed under the Northampton tables is
(If there is any other outstanding life estate, or estate for years, recite the fact).

VI. I am of the opinion that it would be for the benefit of said infant to sell *(or mortgage, or lease)* said premises, *(or a part, describing it)*, for the following reasons *(state reasons fully)*.

VII. I am further of the opinion that such sale should be made under the following conditions :

So much of the purchase-money as is necessary to discharge the encumbrances on said premises, including the gross sum in lieu of dower to _____, the mother of said infant, and the costs and expenses of these proceedings, to be paid in cash on the delivery of the deed, and the balance of the purchase-money remain on bond and mortgage on the premises to be given to the county treasurer of _____ county, interest to be paid semi-annually, at the rate of _____ per cent., and the principal when said infant shall arrive at the age of twenty-one years.

All of which is respectfully submitted.

Dated, _____, A. D. 18 ____.

_____, Referee.

No. 99.

ORDER CONFIRMING REPORT OF REFEREE ON PROCEEDINGS TO SELL REAL ESTATE OF INFANT.

Caption as in No. 3. }

On reading and filing the report of _____, the referee duly appointed herein by order bearing date the _____ day of _____, A. D. 18 ____, and on all the proceedings in this application, whereby it appears that a sale *(or mortgage, or lease)* of the real property

(*or the interest therein*), of said infant would be for the benefit of said infant, on motion of _____, attorney for said petitioners, it is ordered that said report be, and the same is hereby in all respects confirmed.

And it is further ordered, that _____, special guardian of said infant be, and he hereby is, authorized, empowered, and directed to sell (*or mortgage, or lease*) said real estate of said infant, at not less than the price, and upon the terms and conditions in said report of said referee stated and specified.

And it is further ordered (*state further directions as to sale, etc.*)

And it is further ordered, that before such sale (*or mortgage, or lease*) the said _____, special guardian as aforesaid, make an agreement therefor, subject to the approval of this court, and report such agreement to the court under oath.

No. 100.

ORDER APPOINTING REFEREE TO EXAMINE JUDGMENT DEBTOR.

Caption as in No. 2.

}

It appearing to my satisfaction by the affidavit of _____, the judgment creditor (*or attorney for the judgment creditor*) herein, that on the _____ day of _____, A. D. 18____, judgment was recovered in an action in the _____ court by _____, against _____, for the sum of _____ dollars, that such judgment was recovered upon personal service of the summons upon the said _____, judgment debtor herein, that a transcript of said judgment was duly filed, and said judgment was duly docketed in the office of the county of _____, that execution against the property of said

judgment debtor was, on the day of A. D. 18 , duly issued to the sheriff of the county of , where said judgment debtor then resided, and still resides, that on the day of , A. D. 18 , the said execution was returned wholly unsatisfied, and said judgment remains wholly due and unpaid, I do hereby order and require the said , judgment debtor as aforesaid, to appear before , who is hereby appointed referee to take the said examination on the day of , A. D. 18 , at o'clock in the noon, at his office No. street, in the of , to be examined concerning his property. And the said , judgment debtor as aforesaid, is hereby forbidden to sell, transfer, or make, or permit any other disposition of, or interference with any of his property not exempt by law from execution until further order in the premises.

Dated, , A. D. 18 .

No. 101.

OATH OF REFEREE TO TAKE EXAMINATION IN SUPPLEMENTARY PROCEEDINGS.

Title of the Cause. }

I, , the referee appointed by order bearing date the day of , A. D. 18 , to take the examination of

herein, do swear that I will faithfully discharge my duty as such referee, and make a full, true, and just report thereon, according to the best of my understanding and ability.

Jurat.

Signature.

No. 102.

REFEREES REPORT OF EXAMINATION IN SUPPLEMENTARY PROCEEDINGS.

Title of the Cause.

}

To

I, _____, the referee duly appointed by order bearing date the _____ day of _____, A. D. 18____, to take the examination of _____,

_____, judgment debtor herein, which said order is hereto annexed, do hereby certify and report:

I. I have taken and subscribed the statutory oath, which is hereto annexed.

II. The said _____ duly appeared before me pursuant to the above order with his counsel, _____, Esq.,

_____, Esq., appearing for _____.

III. The said _____, being first duly sworn, on his direct examination by _____, testified as follows:

(If the parties insist, insert every question and answer, if not, the testimony may be taken in narrative form.)

And on cross-examination by _____, said _____, testified as follows:

(As above.)

IV. I do further certify that every answer or declaration made by said _____, on such examination, is inserted herein, that after such examination was completed the same was carefully read over to the said _____, who thereupon subscribed the same in my presence. All which is respectfully submitted.

Dated, _____, A. D. 18____.

_____, Referee.

No. 103.

ORDER FOR THE EXAMINATION OF WITNESSES AND OF BOOKS. ETC., UNDER SECTION 21 OF THE ASSIGNMENT ACT.

Court.

In the matter of the assignment

of _____ ,

to _____ ,

for the benefit of creditors :

On reading and filing the petition of

_____, verified on the _____ day of _____ , A. D.

18 _____ , and on motion of _____ , at-

torney for the petitioner, it is ordered that (*give names of witnesses to be examined*), be and appear before

_____, the referee hereby appointed, at his

No. _____ street, in the _____ of _____ ,

on the _____ day of _____ , A. D. 18 _____ , at

o'clock in the _____ noon, and there and then be examined

as to (*state matters as to which the examination is to be made*).

And it is further ordered that said (*state name of witness by whom books are to be produced*) bring and produce for examination before said referee, the following books and papers (*name each book or paper required*)

Dated, _____ , A. D. 18 _____ .

No. 104.

OATH OF REFEREE IN PROCEEDINGS UNDER THE ASSIGNMENT ACT.

Title of the Proceeding. }

I, _____ , the referee appointed by order bearing date the _____ day of _____ A. D. 18 _____ , to (*state object of reference*), do hereby swear that I

will faithfully and fairly discharge my duty as such referee, and make a just and true report (*or return*) of the proceedings on such reference, according to the best of my understanding and ability.

Jurat.

Signature.

No. 105.

CERTIFICATE OF REFEREE TO EXAMINATION OF WITNESSES
AND EXAMINATION OF BOOKS, ETC., UNDER SECTION 21
OF THE ASSIGNMENT ACT.

Title of the Proceeding.

I, the undersigned referee, duly appointed to take the examination of witnesses in these proceedings, by order bearing date the day of , A. D. 18 , which said order is hereto annexed, do hereby certify that I have been attended on such examination by the petitioner, and by , his counsel, by (*naming witnesses*), and by , their counsel.

I do further certify that (*naming party producing*) produced before me the following books and papers (*naming them*).

Before proceeding with the reference I took and subscribed the statutory oath, which is herewith filed.

_____, a witness named in said order being duly sworn, testified as follows: *(If the parties request, the testimony must be taken by question and answer. If extracts are taken from books the books must be carefully identified, and pages given.)*

I further certify that every answer or declaration made by said witnesses, or either of them, is inserted, that after such examination of each of said witnesses was completed the same was carefully read over to him, and he, in my presence, subscribed his name thereto.

I further certify that each extract from books or papers was carefully compared by me with said book or paper, that the same was correctly transcribed, and were taken from the books at the places where they purport to be found.

Dated, _____, A. D. 18 ____ .
 _____, Referee.

No. 106.

ORDER REFERRING DISPUTED CLAIM UNDER SECTION 26 OF THE ASSIGNMENT ACT.

Caption as in No. 3. }

On reading and filing the petition of _____, verified on the _____ day of _____, A. D. 18 ____, whereby it appears that _____ has presented a claim against said estate, which is disputed by the assignee; now on motion of _____, attorney for _____,

It is ordered that the said claim, and all the issues therein be, and the same hereby are, referred to _____, Esq., as sole referee, to hear and determine the same.

No. 107.

REPORT OF REFEREE OF DISPUTED CLAIM UNDER ASSIGN- MENT ACT.

Title of the Proceeding. }

To the _____ Court.

I, the undersigned referee, duly appointed herein by

order bearing date the day of , A. D. 18 ,
to hear and determine the disputed claim of
 , against the estate of
 , do hereby report :

I. I have taken and subscribed the statutory oath which is hereto annexed (*or the oath was duly waived as by stipulation hereto annexed*).

II. I have been attended by the parties and their counsel, _____, appearing for _____, and _____.

Esq., appearing for _____, have heard the allegations and proofs of the parties, and the arguments of counsel thereon.

III. I find as matters of fact :

1.

2.

and as a conclusion of law that there is due from said estate to _____, the petitioner herein, the sum of _____ dollars, and interest thereon from the _____ day of _____ A. D. 18____, for which said sum I order judgment with costs. _____ of _____, A. D. 18____.

, Referee.

No. 108.

ORDER REFERRING ACCOUNT OF ASSIGNEE UNDER THE
ASSIGNMENT ACT.

Caption as in No. 3.

$$\left. \begin{array}{l} \text{ } \\ \text{ } \end{array} \right\}$$

_____, the assignee of the above
 named assignor, having, on the _____ day of _____,
 A. D. 18____, duly filed his account as such assignee, and a
 citation having been duly issued requiring all persons in-
 terested in said assigned estate to appear on the final set-
 tlement of said account,

on said account so filed, and on all the proceedings herein,
on motion of _____, attorney for

It is ordered that it be referred to _____,
_____, Esq., as sole referee to take and state said
account, and to examine parties and witnesses on oath in
reference thereto.

It is further ordered that said referee take proof and re-
port as to who are entitled to share in the distribution of
said estate, and the priority and proportion of each.

It is further ordered that any party or creditor may con-
test any claim presented before said referee, and the said
referee shall thereupon take proof and report upon (*or hear
and determine*) the validity of said claim.

It is further ordered that _____ days notice shall
be given to all creditors whose claims have been presented,
or who appeared on the return of the citation.

No. 107.

REPORT OF REFEREE ON THE ACCOUNT OF AN ASSIGNEE UNDER THE ASSIGNMENT.

Court,

In the matter of _____,
the accounting of _____,

Assignee of _____.

To the _____ Court.

I, the undersigned referee, duly appointed by order
bearing date the _____ day of _____, A. D. 18 _____,
to take and state the account of _____,
the assignee above named, do hereby report:

I. I have taken and subscribed the statutory oath which
is hereto annexed.

II. I have been attended on said hearing by (*state ap-*

pearances fully, whether in person or by attorney), have heard the allegations and proofs of the respective parties and the arguments of counsel thereon.

III. I find that said _____, assignor herein, was, prior to the _____ day of _____, A. D. 18____, engaged in business at _____, and that on said last mentioned day, he made, executed, duly acknowledged, and delivered an instrument in writing and under seal, wherein and whereby he assigned all his property and estate to _____, the above named assignee, for the benefit of his creditors.

IV. The said _____, assignee as aforesaid, duly joined in the execution and acknowledgment of said assignment, and accepted said trust, and the same, so excuted, acknowledged, and accepted, was, on the _____ day of _____, A. D. 18____, duly recorded in the office of the clerk of the county of _____.

V. The following preferences were created by the said assignment (*state them fully*).

VII. On the _____ day of _____, A. D. 18____, _____, assignor (*or assignee*) of said assigned estate, pursuant to the statute in such case made and provided, duly verified and filed in the office of the clerk of this court, schedules of the assigned estate, wherein and whereby it appeared that the liabilities of the said assignor were \$ _____, that the nominal value of the assets was \$ _____, that the actual value of the assets was \$ _____, and thereupon the said assignee was, on the _____ day of _____, A. D. 18____, duly ordered by Hon. _____, a justice of this court, to file a bond pursuant to the statute in such case made and provided, in the penalty of \$ _____, conditioned for the faithful performance of his duties.

VII. On the _____ day of _____, A. D. 18____, the said _____, residing at _____, and _____, residing at _____, duly made, executed, and acknowledged a bond in the penalty of \$ _____ in accordance with the statute in such

case made and provided, and the same was, on the day of A. D. 18 , duly approved by Hon.

 , a justice of this court, and on the same day was duly filed in the office of the clerk of this court.

VIII. On the day of , A. D. 18 , on petition duly verified by him, the said assignee was, by an order duly made by Hon.

 , a justice of this court, authorized and directed to advertise for creditors to present their claims, with vouchers, duly verified, in the , a newspaper published the of , once in each week for six successive weeks.

IX. That said advertisement, of which the following is a copy (*insert copy*), was duly published as directed by said order.

X. A copy of such advertisement, enclosed in a sealed envelope, on which was endorsed a direction to return to , attorney at law, No.

street, in the of , if not delivered in ten days, was addressed to each creditor whose name appears on the books of the assignor, at the residence, or place of business, therein given, and was on the day of , A. D. 18 , deposited in the post office in the of , and the postage prepaid thereon. Of these only the following (*naming them*) have been returned.

XI. The following persons, and none others, have presented claims, duly verified to the assignee, viz.: (*Give names, addresses, amount claimed, amount found due, and for what.*)

XII. The said assignee, on the day of , A. D. 18 , presented to this court his account, duly verified, on that day, as follows :

Dr. To Stock as inventoried.....\$

“ “ Accounts.....\$

Increase\$

Cr. By Decrease.....\$

“ “ Expenses\$

“ Dividends.....\$

Balance.....\$

XIII. On the day of , A. D. 18 , on petition of the assignee, duly verified, an order was duly made by a justice of this court, directing the issue of a citation to all persons interested in said estate to appear on the final settlement of the accounts of said assignee. Such citation was, pursuant to the statute in such case made and provided, duly issued out of this court, was published as by law required in the , of , and in the , a newspaper published in the of . Said citation was personally served upon the following persons (*naming them*), by delivering to and leaving with each of them a copy thereof, upon all by publication, as required by said order, and by statute, and upon all whose names and address by careful inquiry could be ascertained, by mail as directed in said order, and all the directions in said order contained have been fully complied with.

XIV. Objections to said accounts have been filed as follows: (*State objections in full, with the name of the party filing the same.*)

XV. Summons to attend this reference on the day of , A. D. 18 , at my office No. street, in the of at o'clock in the noon, was, on the day of , A. D. 18 , duly issued by me, and duly served upon (*give names*) the only parties who appeared on the return of the said citation.

XVI. After filing and approval of his bond, the said assignee, in performance of his duties as such, took possession of the assigned estate, as follows: (*state fully of what the assignee took possession.*) That of said estate he has sold (*state what*)—

Realized therefrom.....	\$
What he collected.....	\$

Total receipts.....	\$
---------------------	----

That he has paid for necessary expenses of administration \$, which said expenditures were justly and properly made, and should be allowed to said assignee.

XVII. I do therefore state the account of said assignee as follows :

	Dr.
To Stock as per inventory.....	\$
“ Accounts “ “	\$
Total	\$
By decrease in value of stock.....	\$
“ “ “ accounts.....	\$
“ expenses	\$
“ payments as per schedule A.....	\$
Leaving a balance of	\$

subject to the costs of this accounting and the commissions of the assignee. The commissions of said assignee amount to \$, leaving in his hands the sum of \$, from which the costs of this accounting are to be deducted.

Schedule B hereto annexed contains a statement of those entitled to share in the distribution of said estate, and the priority and proportion of each.

Dated, , A. D. 18 .

, Referee.

No. 110.

ORDER APPOINTING REFEREE ON ACCOUNTING IN SUR-ROGATE'S COURT.

Caption as in No. 3. }

, the executor above named
having duly filed his account of his proceedings as such
executor, and , and
, having filed objections thereto,

It is ordered that it be referred to
, Esq., to take and report the evidence upon the
facts in said accounts set forth, and the objections thereto,

to hear and determine the issues arising on the settlement of said account, and to report thereon, subject to confirmation by said surrogate.

No. 111.

REFEREE'S REPORT, ON ACCOUNT IN SURROGATE'S COURT.

Title of the Proceedings. }

To the Surrogate's Court.

I, the undersigned referee to whom, by order of this court, bearing date the day of , A. D. 18 , to (*give epitome of order*), do hereby report :

I. I have taken and subscribed the statutory oath which is hereto annexed.

II. I have been attended by the several parties as follows (*recite appearances*), have heard the allegations and proofs of the several parties hereto, and the arguments of counsel thereon. The testimony taken before me is hereto annexed, marked schedule "A."

III. I find that the accounts of said executor as presented by him are in all respects correct, (*if incorrect in any particular add "except in the following particulars," viz.*)

IV. I do further find, from the testimony taken before me, that the said executor has used due diligence in the collection of debts due the estate, and has recovered all that could be collected. (*If there are exceptions specify each separately.*)

V. I find that the stocks, securities, and other personal property of said estate were sold in the usual manner, at public auction, that such sales were properly advertised, that the said executor used due diligence in endeavoring to obtain, and did obtain, all that said property was reasonably worth.

No. 113.

REFEREE'S REPORT ON PROCEEDINGS TO DISCOVER DEATH
OF LIFE TENANT.

Title of the Proceeding. }

To the Supreme Court.

I, the undersigned _____, duly
appointed referee herein, by order of this court, bearing
date the _____ day of _____, A. D. 18____, do hereby
report :

I. I have taken and subscribed the statutory oath, which
is hereto annexed.

II. I have been attended by the parties and their counsel,
_____, appearing in behalf
of the petitioner, and _____ appearing
in behalf of _____.

III. I have heard the proofs and the allegations of the
parties and their witnesses, which are hereto annexed,
marked schedule "A." Each of such depositions was carefully
read by me to the person making the same, and after
such reading, the same was duly subscribed by the deponent
in my presence.

IV. I have heard the arguments of counsel on the testimony
produced, and I do find as follows: (*state findings.*)

Dated, _____, A. D. 18____.

_____, Referee.

No. 114.

ORDER APPOINTING REFEREE TO SETTLE ISSUES.

Caption as in No. 1. }

On reading and filing the affidavits of
_____, and _____, verified
on the _____ day of _____, A. D. 18____, and notice

of motion, after hearing _____,
of counsel for plaintiff (*or defendant*) in favor of said mo-
tion, and _____, of counsel for de-
fendant (*or plaintiff*) in opposition thereto, on motion of
_____, attorney for said plaintiff
(*or defendant*), It is ordered, that the issues of fact between
the parties to this action be settled before
_____, Esq., who is hereby appointed referee
for that purpose.

It is further ordered that on such reference all persons entitled to take evidence in said cause be summoned before said referee.

No. 115.

REPORT OF REFEREE TO SETTLE ISSUES.

Title of the cause.

To the Court. .

I, the undersigned, duly appointed by order bearing date
the day of , A. D. 18 , referee to settle
the issues of fact arising on the pleadings in this action, do
hereby certify and report :

I. All parties entitled to take evidence in this cause were duly summoned to appear before me pursuant to said order, as appears by the summons hereto annexed. I have been attended by (*recite appearances*), and have carefully examined the pleadings herein.

II. I have settled the issues to be tried as follows:

- 1.
- 2.

III. On the trial the plaintiff (*or defendant*) has the affirmative on the first interrogatory, the defendant (*or plaintiff*) has the affirmative on the second.

Dated _____, A. D. 18__.

, Referee.

No. 116.

ORDER APPOINTING REFEREE TO COMPUTE IN FORECLOSURE.

Caption as in No. 1.

}

Judgment on failure to answer the complaint filed herein having been ordered against all the defendants in said complaint named, as follows (*give names of all defendants*), on motion of _____, attorney for the plaintiff, It is ordered, that it be referred to _____, Esq., of _____, to take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff or his agent on oath as to any payments which have been made, and to compute and ascertain the amount due on the mortgage set forth in the complaint filed herein, and that he report with all convenient speed.

No. 117.

REPORT OF REFEREE TO COMPUTE AMOUNT DUE IN FORECLOSURE.

Title of the Cause.

}

To the _____ Court.

I, the undersigned referee, duly appointed by order herein bearing date the _____ day of _____, A. D. 18____, to compute the amount due to the plaintiff on the mortgage set forth in the complaint herein, do hereby report:

I. I have taken and subscribed the statutory oath, which is hereto annexed.

II. I have taken proof of the facts and circumstances

No. 118.

TERMS OF SALE IN FORECLOSURE.

Title of the Cause. }

The premises described in the annexed advertisement of sale, will be sold under the direction of

, referee, upon the following terms :

1. per cent. of the purchase money of the parcels sold must be paid to the said referee at the time and place of sale, for which the referee's receipt will be given.

2. The residue of said purchase money must be paid to the said referee at his office No. street, in the of , on the day of , A. D. 18 , at o'clock in the noon, when the said referee's deed will be ready for delivery.

3. The referee is not required to send any notice to the purchaser ; and if he neglects to call at the time and place specified to receive his deed, he will be charged with interest thereafter on the whole amount of his purchase, unless the referee shall deem it proper to extend the time for the completion of said purchase.

4. All taxes, assessments, and water rates, which, at the time of sale are liens or encumbrances upon said premises and have not become absolute, will be allowed by the referee out of the purchase money, provided the purchaser shall, previous to the delivery of the deed, produce to the said referee proof of such liens, and duplicate receipts for the payment thereof.

5. The purchaser of said premises, or any portion thereof, must, at the time and place of sale, sign a memorandum of his purchase and an agreement to comply with the terms and conditions of sale, and pay said per cent. of the purchase money.

6. The biddings will be kept open after the property is struck down ; and in case any purchaser shall fail to com-

ply with any of the above conditions of sale, the premises so struck down to him will be again put up for sale under the direction of said referee, under the same terms of sale, without application to the courts, unless the plaintiff's attorney shall elect to make such application; and such purchaser shall be held liable for any deficiency there may be between the sum for which said premises shall be struck down upon the sale and that for which they may be purchased on the re-sale, and also for any costs or expenses occurring on such re-sale.

Dated, _____, A. D. 18 ____ , Referee.

MEMORANDUM OF SALE.

_____ have this ____ day of _____, A. D. 18 ____, purchased the premises described in the above annexed printed advertisement of sale, for the sum of _____ and hereby promise and agree to comply with the terms and conditions of the sale of said premises as above mentioned and set forth.

No. 119.

REFEREE'S DEED IN FORECLOSURE.

THIS INDENTURE, made the ____ day of _____, in the year one thousand eight hundred and _____, between _____, a referee in this action as hereinafter mentioned, party of the first part, and (*name purchaser*), party of the second part.

Whereas, at a special term of the _____ court, held at _____, in the _____ of _____, on the ____ day of _____, one thousand eight hundred and _____, it was, among other things, ordered, adjudged, and decreed by said court, in a certain action then pending in said

court, between (*name plaintiffs*), plaintiffs, and (*name defendants*), defendants,

That all and singular the mortgaged premises mentioned in the complaint in said action, and described in the judgment therein, or such part thereof as might be sufficient to discharge the mortgage debt, the expenses of the sale, and the costs of the action, as provided by sections 1626 and 1676 of the Code of Civil Procedure, and which could be sold separately without material injury to the parties interested, be sold at public auction, according to the statute in such case made and provided, and the rules and practice of said court, by or under the directions of the said party of the first part as referee thereby duly appointed for that purpose; that the said sale shall be made in the county where said mortgaged premises are situated, that the said referee give public notice of the time and place of such sale, according to the statute and the practice of said court, and that any of the parties in said action might become a purchaser on such sale; that the said referee execute to the purchaser of the said mortgaged premises, or such part or parts thereof as should be sold, a good and sufficient deed of conveyance for the same:

And where^{as}, the said referee, in pursuance of the said judgment and decree of the said court, did on the day of , one thousand eight hundred and , sell at public auction, at the (*give time and place of sale*) the premises in the said judgment mentioned, due notice of the time and place of such sale having been first given, in accordance with the said judgment, at which sale the premises hereinafter described were struck off to the said party of the said part, for the sum of dollars, that being the highest sum bidden for the same.

Now this Indenture Witnesseth, That the said referee, the party of the first part to these presents, in order to carry into effect the sale so made by him as aforesaid, in pursuance of the judgment and decree of the said court, and in conformity with the statute in such case made and

provided, and also in consideration of the premises, and of the said sum of money so bidden as aforesaid, being first duly paid by the said party of the second part, the receipt whereof is hereby acknowledged, Hath bargained and sold, and by these presents doth grant and convey unto the said party of the second part (*describe premises sold*),

Together with all the right, title, and interest and estate of each and all of the parties to said action, of, in, and to the said mortgaged premises, and each and every part thereof, To have and to hold all and singular the premises above mentioned and described and hereby conveyed or intended so to be, unto the said party of the second part, , and assigns, to

their own proper use and behoof forever.

In witness whereof, the said , referee as aforesaid, hath hereunto set his hand and seal the day and year above written.

Sealed and delivered in }
the presence of }

State of , }
County of , } ss.

On this day of , in the year one thousand eight hundred and , before me personally came , to me known, and known to me to be the individual described in, and who executed the foregoing instrument, and he thereupon acknowledged to me that he had executed the same.

No. 120.

REFEREE'S REPORT OF SALE.

Title of the Cause. }

To the Court.

I, the undersigned referee, duly appointed by the judgment entered herein on the day of , A. D.

18 , to make the sale of the mortgaged lands and premises in said judgment described, do hereby respectfully report :

I. I gave due notice that said mortgaged premises would be sold at public auction on the day of , A. D. 18 , at in the of , at o'clock in the noon, pursuant to the statute, and the rules and practice of this court, as appears by the affidavits hereto annexed, marked Schedule A.

II. On said day of , A. D. 18 , I attended at the time and place for which said sale was noticed, offered the said land and premises for sale to the highest bidder, and sold the same to , for the sum of dollars, he being the highest bidder therefor, and at the same time received from him per cent. of said sum of dollars.

III. I have paid, pursuant to said judgment (*or allowed to the purchaser*), out of the purchase money, the sum of dollars for taxes, assessments, and water rates, which were liens on the premises so sold at the time of such sale.

IV. I have received from the said , purchaser as aforesaid, the balance of said purchase money, to wit, the sum of dollars, and have disposed of the same as follows :

1. I have retained for my fees and expenses the sum of dollars.

2. I have paid to , attorney for the plaintiff the sum of dollars, the costs awarded to him by the judgment herein, and taken his receipt, hereto annexed, marked Schedule B.

V. I have paid to the plaintiff (*or to plaintiff's attorney*), for the sum due on the bond and mortgage on which this action was brought, the sum of dollars, and taken his receipt therefor, which is hereto annexed.

VI. I made, executed, acknowledged, and delivered to the purchaser, pursuant to said judgment, a good and sufficient deed of the premises so sold.

The following is a description of the premises so sold and conveyed by me, as set forth in the complaint herein, and in the deed so made and executed by me, viz. (*insert description*).

(*If there was a deficiency in the suit*)—

VII. I further report that there still remains due to the plaintiff herein on account of said mortgage debt, after applying the proceeds of the sale of said property as set forth herein, the sum of _____ dollars, which I report as a deficiency on said sale.

(*If there was a surplus, insert in place of the foregoing*)—

And I do further report, that after paying out of the proceeds of said sale the several sums set forth herein, there remained the sum of _____ dollars, which I have paid into court, and deposited with (*state where deposited*) pursuant to the statute in such case made and provided, for the use of the person or persons entitled thereto, to abide the further order of this court, as by said judgment ordered.

STATEMENT.

Amount due on bond and mortgage on the	
day of _____, A. D. 18 _____, as per	
judgment.....	\$
Interest to date (<i>when sale closed</i>).....	\$
Amount of purchase money.....	\$
Allowed for taxes.....	\$
Referee's fees and expenses.....	\$
Paid plaintiff.....	\$
Surplus (<i>or deficiency</i>).....	\$

Dated, _____, A. D. 18 _____.

Referee.

Title of the Cause. }

Received this _____ day of _____, A. D. 18 _____, from _____, the referee herein, the sum of _____ dollars, under the provisions of the judgment herein, said sum being part of the proceeds of the sale of the premises described in the complaint herein, and being the amount of my costs in said action as taxed.

No. 121.

ORDER APPOINTING REFEREE AS TO CLAIMS FOR SUR-
PLUS MONEYS IN FORECLOSURE.

Caption as in No. 1.

}

On reading and filing notice of the claim of
to surplus moneys in this action, and the
affidavits of , and
, on the referees report of sale herein,
and on proof of due service of notice of this application on
all parties who have appeared, or who have served notice
of claims to such surplus moneys, after hearing
, of counsel for said
, in favor of this motion, and
, of counsel for
, in opposition thereto, on motion of
, attorney for ,

It is ordered, that it be referred to
, Esq., to ascertain and report the amount due
to said , or to any other
person, which is a lien on said surplus moneys, and to as-
certain the priorities of the several liens thereon.

No. 122.

REFEREE'S SUMMONS ON REFERENCE AS TO SURPLUS
MONEYS IN FORECLOSURE.

Title of the Cause.

}

By virtue of an order of reference herein made on the
day of , A. D. 18 , I, the undersigned ref-
eree named therein, do hereby summon you to appear be-

fore me at my office, No. _____ street, in the
 of _____, on the _____ day
 of _____, A. D. 18____, at _____ o'clock in the
 noon to ascertain the validity of the claim of _____
 _____, to the surplus moneys arising on the
 sale of the mortgaged premises named in the complaint
 herein, and also to ascertain the amount due to any other
 person, which is a lien on the said surplus moneys, and to
 ascertain the priorities of such liens.

Dated, _____, A. D. 18____.

To (*recite parties*)

_____, Referee.

No. 123.

REPORT OF REFEREE AS TO SURPLUS MONEYS.

Title of the Cause.

}

To the _____ Court.

I, the undersigned referee, appointed by order of this
 court bearing date the _____ day of _____ A. D. 18____,
 to ascertain and report the amount due to _____
 _____, and the validity and amount of any other
 lien upon such surplus moneys, and the priorities of such
 liens, do hereby report:

I. I have taken and subscribed the statutory oath which
 is hereto annexed.

II. I have caused all the parties who have appeared in
 this action, the owner of the equity of redemption, and all
 persons who have filed notice of claim to such surplus, to
 be summoned to appear before me, pursuant to the rules
 and practice of this court, as appears by said summons
 and proof of due service thereof, and the certificate of the

clerk showing what notices of claim have been filed, all which are hereto annexed, marked Schedule A.

III. I have been attended on said reference by (*state appearances*), have heard the proofs and allegations of the parties, and the arguments of counsel thereon. The testimony taken before me is hereto annexed, marked Schedule B.

IV. The amount of such surplus is dollars, as appears by the certificate of the (*give title of officer making certificate*) hereto annexed, marked Schedule B.

V. I find that _____ is entitled to the whole of said surplus.

All which is respectfully submitted.

Dated, _____, A. D. 18 .

_____, Referee.

No. 124.

ORDER FOR INTERLOCUTORY JUDGMENT AND APPOINTING REFEREE TO ADMEASURE DOWER.

Caption as in No. 1.

}

On reading and filing the affidavit of _____, that defendant has failed to appear (*or answer the complaint herein*), or (*that the right of plaintiff to recover her dower is not disputed by the answer herein*), and on all the pleadings and proceedings in this cause, on motion of _____, attorney for the plaintiff, It is ordered, that plaintiff's dower in said property, described in said complaint, to wit, (*insert description*), be admeasured by _____, who is hereby appointed referee for that purpose.

No. 125.

OATH OF REFEREE IN ACTION FOR DOWER.

Title of the Cause.

}

I, _____, the referee appointed herein by order (*or judgment*) bearing date the _____ day of _____, A. D. 18____, do solemnly swear that I will faithfully, honestly, and impartially execute the trust reposed in me by said order (*or judgment*).

Jurat.

Referee.

No. 126.

REPORT OF REFEREE TO ADMEASURE DOWER.

Title of the Cause.

}

To the

Court.

I, the undersigned referee, duly appointed by order (*or interlocutory judgment*) herein, bearing date the _____ day of _____, A. D. 18____, to admeasure the dower of _____, plaintiff herein, in the property described in the complaint, do hereby report:

I. Before proceeding with said reference I took and subscribed the statutory oath, which is hereto annexed.

II. Due notice of the time and place of such admeasurement was served on all the parties interested, as appears by the said notice and affidavits of service hereto annexed, marked Schedule A.

III. I was attended on such admeasurement by (*recite appearances*).

IV. I caused a survey and map of said premises to be made, which is hereto annexed, marked Schedule B.

V. I then proceeded to admeasure and lay off to the said _____, plaintiff, for her dower, the one third of said premises, as follows, (*recite description, giving metes and bounds,*) being the portion colored red on said map, Schedule B.

(*If admeasurement is not practicable insert, instead of V,*)

In my opinion it is not practicable, nor for the best interest of all parties, to admeasure and lay off a distinct parcel to the plaintiff for the following reasons, viz. (*state facts and reasons fully*).

VI. I do further report that the following are the items of my charges for such admeasurement, including my fees as referee :

_____	days services as referee at six dol-	
	lars per day	\$
Cash paid _____	, surveyor,	
_____	at five dollars per day	\$
Cash paid _____	, assistant	
_____	to said surveyor, at two dollars per day.....	\$

In witness whereof I have hereto set my hand seal this
 day of _____, A. D. 18 ____ [L. S.]
 _____, Referee.

Acknowledgment as in No. 119.

No. 127.

ORDER OF REFERENCE ON DEFAULT, OR WHERE AN INFANT IS A PARTY IN PARTITION.

Caption as in No. 1. }

On reading and filing the affidavits of _____, and _____, and due proof of service of notice of this motion, and on all the

II. I have caused the several parties to this cause to be summoned to appear before me, as appears by said summons, and affidavits of service hereto annexed, marked Schedule A.

III. I have been attended on said reference by (*recite appearances*), have heard the allegations and proofs of the parties, which are hereto annexed, marked Schedule B. The testimony of each witness was carefully read to him by me, and each thereupon subscribed his name.

IV. I find that the matters set forth in the complaint are true.

V. I have ascertained the rights, shares, and interests of the several parties in the property of which partition is sought, to be as follows:

(State fully the right, share, and interest of each party, the liens or incumbrances thereon, and the name of each lienor or incumbrancer.)

VI. I find that the premises are so circumstanced that a partition thereof cannot be made without great prejudice to the owners thereof, for the following reasons: (*state reasons fully.*)

VII. I further report that in pursuance of section 1658 of the Code of Civil Procedure I have caused due notice to be published, requiring each person not a party, who, at the date of my appointment, had a lien upon any undivided share or interest in the property at a time and place in said order named, to prove his lien and the amount due thereon, as appears by said notice, and affidavits hereto annexed, marked Schedule C. No person not a party has appeared before me pursuant to said notice.

VIII. An abstract of the title by which said premises are held is hereto annexed, marked Schedule D.

All of which is respectfully submitted.

Dated, , A. D. 18 .

, Referee.

SCHEDULE D.

Abstract of conveyances referred to in foregoing report :

J.	K.	and	}	War. Deed, Full. Cov.	
E.	K.	his wife		Consideration \$	
				Dated	
	to			Acknowledged	
L.	B.			Recorded	
				Lib.	P.
				on	
L.	B.		}	Purchase money Mortgage	
				to secure \$	
	to			on	
J.	K.			Dated	
				Acknowledged	
				Recorded	

, Referee.

No. 129.

NOTICE BY REFEREE TO CREDITORS TO PROVE LIEN.

Title of the Cause. }

I, _____, the referee duly appointed by order made herein on the _____ day of _____, A. D. 18____, do hereby give notice to and require each person who is not a party to the above entitled action, and who, on the (*date of the order of reference*) had a lien upon any undivided share or interest in the following described property, to appear before me at my office No. _____ street, in the _____ of _____ on the _____ day of _____, A. D. 18____, at _____ o'clock in the _____ noon, to prove his lien, and the amount due, or to become due thereon, by virtue thereof.

The property is described in the complaint herein as follows: (*insert description.*)

Dated, _____, A. D. 18____.

, Referee.

No. 130.

REPORT OF SALE IN PARTITION.

Title of the Cause.

}

To the

Court.

I, the undersigned referee, appointed by the interlocutory judgment entered herein on the day of
 . , A. D. 18 , do hereby report :

I. I have caused due notice, pursuant to the statute in such case made and provided, and to the rules and practice of this court, to be given of the time and place of sale as appears by copies of said notice, and affidavits hereto annexed, marked Schedule A.

II. Pursuant to such notice I did, on the day of
 , A. D. 18 , at o'clock in the noon, at
 , the time and place in said notice specified, expose the said premises for sale at auction to the highest bidder.

III. The said several lots or parcels in said complaint described were sold separately to the following persons respectively, the highest bidders therefor, viz. :

The parcel described as follows (*insert description*) was sold to
 , for the sum of
 dollars, he being the highest bidder therefor.

IV. The written terms of sale were made known to the persons in attendance at said sale before offering said property, and were as follows :

(*As in No. 118.*)

V. The said , and the
 said , have signed the conditions of sale above mentioned, and have paid to me the amount required to be paid thereby.

All which is respectfully submitted.

Dated, , A. D. 18 .

 , Referee.

No. 131.

CONSENT TO REFER IN MATRIMONIAL ACTIONS.

Title of the Cause.

}

We hereby consent that a jury trial in the above entitled action be, and the same hereby is, waived, and that an order be entered by either party referring said action and all the issues therein to a referee to be designated by the court, to hear and determine the same.

Dated,

, A. D. 18 .

, Plaintiff's Attorney.

, Defendant's Attorney.

No. 132.

ORDER OF REFERENCE IN ACTION FOR DIVORCE FOR ADULTERY.

Caption as in No. 1.

}

On reading and filing the stipulation of the parties hereto annexed waiving a trial by jury, and consenting to a reference of this action, and all the issues therein, It is ordered, that this action, and all the issues therein, be referred to _____, Esq., to hear and determine the same.

(If, where the wife is plaintiff, it be desired that the referee should report on the question of alimony, add)—

It is further ordered that the said referee inquire and report as to the situation and value of the real property of the defendant, and the amount of his income therefrom, the value of his personal property, and the income therefrom, and the amount of his income from his professional services, and what would be a proper sum to be allowed to said plaintiff for alimony, and for the support, maintenance, and education of the children of said marriage.

(If it is desired that the referee should ascertain who should have the custody of the children, add) —

It is further ordered, that said referee enquire and report who should have the custody of the children of said marriage.

The general form of the order of reference is the same in all contested matrimonial actions.

No. 133.

REFEREE'S REPORT IN AN ACTION FOR DIVORCE FOR ADULTERY.

Title of the Cause.

}

To the

Court of

I, the undersigned referee, duly appointed by an order bearing date the day of , A. D. 18 , to hear and determine this action and all the issues herein, do hereby report :

I. That I have been attended on said reference by the parties thereto, , Esq., appearing on behalf of said plaintiff, and , appearing on behalf of the said defendant, and having duly considered the allegations and proofs of the parties and the arguments of counsel thereon, do find as follows :

I. That on the day of A. D. 18 ,

the plaintiff intermarried with the defendant at
 , in the state of .

II. That from that time until on or about the day of
 , A. D. 18 , the plaintiff and defendant lived
 and co-habited together as husband and wife.

III. That the issue of said marriage are ,
 aged years on the day of last past,
 and , aged years on the day of
 last past.

IV. That on the day of , A. D. 18 , at
 No. street, in the of
 , the defendant committed adultery with .
(recite other acts if found).

V. That said adultery was committed without the consent, connivance, privity, or procurement of said plaintiff.

VI. That five years have not elapsed since plaintiff discovered the fact of said adultery.

VII. That plaintiff has not voluntarily co-habited with the defendant since the discovery by him of such adultery.

VIII. That at the time of the commission of said acts of adultery both parties were residents of this state, *(or the parties were married within this state; or the plaintiff was a resident of this state when the said adultery was committed, and when this action was begun; or said adultery was committed in this state, and said plaintiff was a resident thereof when this action was begun, as the case may be).*

IX. That there is no judgment or decree in any court of the state, of competent jurisdiction, against plaintiff in favor of defendant for a divorce on the ground of adultery.

1. I find as a conclusion of law that a divorce should be granted to the plaintiff against the defendant for said adultery so committed by him.

2. That the defendant should pay the costs of this action to be taxed, and plaintiff have judgment therefor.

A record of the proceedings and the testimony taken before me are hereto annexed, marked Schedule A.

Before taking any testimony I took and subscribed the statutory oath, which is hereto annexed.

Dated, , A. D. 18 .

, Referee.

(If the referee was directed to report on the question of alimony, insert, as findings of fact)—

X. That the plaintiff has real property of the value of , encumbered by , and personal property of the value of , and that his annual income therefrom is not less than .

XI. That defendant is possessed of real property of the value of , encumbered by , and personal property of the value of , and that his annual income therefrom is not less than , and his annual income from his profession is not less than per year.

(And as a further conclusion of law)—

3. That defendant should pay to the plaintiff alimony at the rate of per year, payable quarterly, on the days of in each year.

(If the referee is directed to inquire which of the parties should have the custody of the children, add, as a conclusion of law)—

4. That the plaintiff should have the care and custody of the children.

5. That the defendant should pay to the plaintiff the sum of . dollars per year from the date of the judgment herein, for the support, maintenance, and education of said children, to be paid quarterly on the days of

in each year, and secure the payment thereof *(by bond and mortgage on real property, or bond with sureties, as the case may be)*.

The general form of report is the same in all contested matrimonial actions.

No. 134.

ORDER OF REFERENCE ON DEFAULT IN ACTION FOR
DIVORCE.

Caption as in No. 1.

}

On reading and filing the affidavit of _____, showing that the summons and complaint were duly served on _____, the defendant, more than twenty days since, and that no notice of appearance (*or demurrer, or answer has been served, or that none of the allegations of the complaint are denied by the answer*) on motion of _____, attorney for the plaintiff, It is ordered, that it be referred to _____, to take proof of all the material facts alleged in the complaint, and report thereon to this court with all convenient speed.

If it is desired that the referee pass upon the questions of alimony and custody of the children, insert directions therefor as in No. 132.

The general form of the order of reference in default is the same in all matrimonial actions.

No. 135.

REPORT OF REFEREE ON REFERENCE ON DEFAULT IN
ACTIONS FOR DIVORCE FOR ADULTERY.

Title of the Cause.

}

To the _____ Court.

I, the undersigned referee, duly appointed by order made herein on the _____ day of _____ A. D. 18____, to (*give epitome of order*) do hereby report :

I. Before proceeding to take testimony I took and subscribed the statutory oath, which is hereto annexed.

II. I have been attended on said reference by (*recite appearances*), have heard the proofs and allegations of the parties. The testimony taken before me on said reference is hereto annexed, marked Schedule A.

Add findings of fact and conclusions of law as in No. 133.

The general form of report on reference on default is the same in all matrimonial actions.

No. 136.

ORDER OF REFERENCE AS TO ALIMONY AND COUNSEL FEES BEFORE DECREE.

Caption as in No. 1.

}

On reading and filing the petition (*or affidavits*) of _____, and notice of motion, and on all the pleadings and proceedings in this cause, no one appearing to oppose, (*or after hearing* _____, of counsel for plaintiff, or defendant, in favor of said motion, and _____, of counsel for defendant, or plaintiff, in opposition thereto,) on motion of _____, attorney for said plaintiff (*or defendant*), It is ordered that it be referred to _____, Esq., to ascertain and report the value of the property of each of the parties hereto, the income therefrom, and what would be a reasonable sum to be allowed to the plaintiff (*or defendant*) for counsel fees, support and maintenance during the pendency of this action, and how, and at what times the same should be paid.

No. 137.

REPORT OF REFEREE AS TO ALIMONY AND COUNSEL FEES
BEFORE DECREE.

Title of the Cause.

}

To the

Court.

I, the undersigned referee, to whom, by order bearing date the day of , A. D. 18 , it was referred (*give epitome of order*) do hereby report :

I. Before taking any testimony I took and subscribed the statutory oath, which is hereto annexed.

II. I have been attended on said reference by (*recite appearances*), and have heard the proofs and allegations of the parties, which are hereto annexed, marked Schedule A.

III. I find that the husband possesses real property consisting of (*give a general description*), of the value of (*state value*), that the same is encumbered by (*state encumbrances*), that the net annual income of the same is not less than the sum of \$.

III. I find that the husband has personal property of the value of \$, yielding an annual net income of not less than \$, and that his annual income from his professional (*or personal*) services is not less than \$.

IV. I find that the wife is wholly without means where-with to support herself and carry on this suit, (*or that she is possessed of, etc., as above*).

(*If for any reason, as living in adultery, the wife is not entitled, insert findings in respect thereto.*)

V. I am therefore of the opinion that , plaintiff (*or defendant*), should, within days after notice of the order entered on this report, pay to the defendant (*or plaintiff*) herein, or to her attorney, the sum of dollars, as a reason-

able counsel fee herein, and that he should pay the said defendant (*or plaintiff*) the sum of _____ dollars per year from the date hereof until judgment shall be entered herein, said sum to be paid in equal weekly payments on Monday of each week, at _____, and that said defendant (*or plaintiff*) give her receipt therefor.

All which is respectfully submitted.

Dated, _____, A. D. 18 ____.

, Referee.

No. 138.

REPORT OF REFEREE IN AN ACTION TO FORECLOSE A
MECHANIC'S LIEN.

Title of the Cause.

$$\left. \begin{array}{l} \text{ } \end{array} \right\}$$

To the Court.

I, the undersigned referee, duly appointed by order
herein bearing date the day of , A. D.
18 , do hereby report:

I. I have been attended on the reference herein by (*re-cite appearances*), have heard the allegations and proofs of the parties, and the arguments of counsel thereon.

II. Before taking any evidence I took and subscribed the statutory oath, which is hereto annexed.

I find as matters of fact :

1. That on the _____ day of _____, A. D. 18____, the defendant was the owner in fee (*if not the owner state what*

cordance with the statute in such case made and provided, upon said buildings and premises for said sum of _____ dollars so due to him, and on said _____ day of _____, A. D. 18____, said lien was, in such case made and provided, duly entered and docketed in the office of said clerk of said county of _____.

8. A copy of said notice was, within ten days thereafter, and on the _____ day of _____, A. D. 18____, duly personally served upon the owner of said premises, by delivering to, and leaving with him, a copy thereof (*or served in any other manner provided by statute*).

9. That no other action or proceeding for the foreclosure of said lien, or to enforce payment of the amount claimed thereunder, has been begun, that said money claimed has not been paid, that said lien has not been cancelled or discharged of record, and that within one year after the filing of said lien, and on the _____ day of _____, A. D. 18____, a notice of the pendency of this action was duly made and filed in the office of the clerk of said county of _____.

10. That there are no other liens upon said property or premises. (*If other persons have filed liens against said property, or if they are encumbered by judgment, mortgage or conveyance, insert findings in respect thereto, and the date when such lien or encumbrance became operative.*)

And I find as conclusions of law :

1. That at the time of the beginning of this action the defendant was, and now is, indebted to the plaintiff in the sum of _____ dollars.

2. That plaintiff, by virtue of the premises, has acquired a valid lien upon the interest the defendant had in said premises on the _____ day of _____, A. D. 18____, the date of filing said notice of lien.

3. That plaintiff is entitled to judgment against the defendant in accordance with the statutes and the rules and practice of this court, for a foreclosure of said lien, for a sale of all the right, title and interest of said defendant in and to said property on the (*date of filing lien*), and for the payment to him from the proceeds of said sale, of the said sum of (*amount found due and interest to date*), with costs to be taxed, and in case the proceeds of said sale should be insufficient to satisfy plaintiff's demand, said plaintiff is entitled to judgment against said defendant for such deficiency as shall remain due to him, and I order judgment accordingly.

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